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No. 31, Original

IN THE

Supreme Court of the United States

October Term, 1967

STATE OF UTAH,
Plaintiff,

v.

UNITED STATES OF AMERICA,
Defendant.

BRIEF OF THE STATE OF UTAH IN RESPONSE TO

THE REPLY BRIEFS OF THE UNITED STATES
THE REPLY BRIEF OF MORTON INTERNATIONAL, INC.
THE MOTION AND BRIEF TO INTERVENE BY GREAT SALT LAKE MINERALS AND CHEMICALS CORPORATION

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February 23, 1968

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SUMMARY OF ARGUMENT

The Court must first determine whether Morton International, Inc. (herein referred to as Morton), the

Great Salt Lake Minerals and Chemicals Corporation (herein referred to as GSL), and other private claimants are indispensable parties to the present action. If they are not indispensable, the case can proceed without jurisdictional impediment. If they are indispensable, then there are five separate questions relating to jurisdiction which must be considered and determined.

Two of the jurisdiction questions concern sovereign immunity from suit, *i.e.*, whether either the State of Utah or the United States has consented to suit in this action by private persons. The third question of jurisdiction is whether Congress has implemented the constitutional judicial power in original actions in this Court for claims against a state by citizens of another state. The fourth and fifth questions of jurisdiction relate to the existence of any federal jurisdiction in original actions for claims between a state and its own citizens, or for claims between the United States and a citizen of a state. If any one of the five questions of jurisdiction should be resolved against the existence of jurisdiction, then that determination will be fatal to any further proceedings in this litigation.

Utah will argue in this brief that Morton and GSL are not indispensable, that they have no right to intervene, and that they should not be permitted to intervene. Further, it will be contended that intervention would destroy the jurisdiction of the Court.

Since this brief is responsive to several reply briefs filed by the United States and Morton, organization is better served and duplicity is more easily avoided by following the points stated in the outline of argument,

rather than responding separately to each of the reply briefs to which this brief responds. All material points in those reply briefs are answered in this brief, but the relevant points are discussed as they apply to the various points of argument in this brief. With respect to GSL, however, a very short summary is included as Point III of this brief because the position occupied by GSL is somewhat different from the position occupied by Morton.

ARGUMENT

POINT I

MORTON AND THE OTHER PRIVATE CLAIMANTS ARE NOT INDISPENSABLE PARTIES TO THE PRESENT LITIGATION.

A. THERE WILL BE NO ADJUDICATION OF TITLE AS TO ANY LANDS IN WHICH MORTON CLAIMS AN INTEREST.

The present action is not one to quiet title. The United States owns no part of the subject lands. Any interest which the United States owned prior to June 15, 1967, was conveyed to the State of Utah by a quit claim deed issued that date, as required by the Great Salt Lake Lands Act. Thus, it is obvious that there will be no adjudication at all directly affecting title. Since Utah now has whatever title the United States had, Utah will still have the same title after the litigation is concluded. Any decree which might be rendered

in this action will have absolutely no affect on the status of the title, but will only determine whether Utah is required to pay the United States for land purportedly conveyed by the deed. That will be the impact, and the only impact, of this litigation.

The United States claims that it owned and quit-claimed to the State of Utah approximately 433,000 acres of reliction lands. Utah denies that these lands are reliction lands, and thus denies that the United States had any ownership interest to convey. So, while Utah acknowledges that it has received by conveyance whatever interest the United States had, Utah claims that it actually received nothing under the deed and should pay for nothing.

The ownership claims which Morton would seek to inject into this proceeding do no more than confuse and mislead. This is so because Morton asserts that the Court in this action will be adjudicating directly on the ownership of lands which Morton claims to own. This simply isn't so. Perhaps the nature and extent of the private claims can best be summarized by distinguishing them from the claims of Utah and the United States.

1. *Claim of Utah.* Utah claims that as an attribute of statehood on January 4, 1896 it received title to the entire bed of the Great Salt Lake, a navigable body of water situated in Utah. In this regard, Utah claims that the surveyed meander line of the lake represented the mean high water mark of the lake at the date of statehood, and all lands within and below the surveyed meander became the property of Utah. Since the date of statehood, the water level of the lake has lowered, ex-

posing more than 600,000 acres of land between the present water's edge and the surveyed meander line. Utah claims that the lowering of the water was not a natural process but was essentially the result of artificial diversions from the tributaries feeding the lake. Hence, the exposed lands are not reliction lands and Utah has not lost title to them.

2. *Relicition Claims by United States and Private Parties.* The entire 600,000 acres of exposed lands are claimed as reliction lands by the riparian owners of the upland adjacent to and surrounding the surveyed meander. Each riparian owner thus claims by reliction the land lakeward from his fee land immediately above the meander. The United States has retained ownership of substantial land above the meander, and its direct reliction claim to the exposed lands lakeward from these retained uplands approximates 325,000 acres. The balance of the land immediately above the surveyed meander has been patented to private persons, and their combined reliction claims to the exposed lands lakeward from their patented lands approximate 275,000 acres. Thus, of the 600,000 acres, the United States claims 325,000 acres by direct reliction and private persons similarly claim the balance of 275,000 acres.

3. *Basart Conflict Between the United States and Private Claimants.* Part of the 275,000 acres claimed by private persons is also claimed by the United States. This claim by the United States is commonly referred to as the Basart doctrine, and it extends to approximately 108,000 acres of exposed lands. The essence of this doctrine is that where the land immediately above the surveyed meander was patented to a private person

at a time when there existed a substantial amount of exposed land below the meander, the patentee took title only to the land above the meander as described in the patent. The United States thus retained ownership of the exposed land below the meander and remained the riparian owner, entitling it to all further "relictions." The private patentees against whom this claim is asserted by the United States generally deny the validity of the *Basart* doctrine. But the applicability of that doctrine to the Great Salt Lake is a question only as between the United States and the private claimants — and has nothing to do with the State of Utah (except to the extent that Utah is now the grantee of the United States, as will be discussed below).

To summarize, the 600,000 acres of exposed lands fall into the following three categories:

1. 325,000 acres claimed by the United States as direct reliction lands, and as to this category Utah and the United States are the only claimants;

2. 167,000 acres claimed by private persons as reliction lands, and as to this category Utah and such private persons are the only claimants—and this land is not in issue in this litigation;

3. 108,000 acres claimed by private persons as reliction lands and also claimed by the United States as "Basart" reliction lands. As to this category, Utah, the United States and private persons all claim ownership, and it is this category only that gives rise to the question of indispensable parties. For simplicity of reference, this category will be designated as "Basart lands" in this brief.

These three categories of exposed lands are illustrated in a diagram included as an appendice at page 76 of this brief.

It should be reasonably apparent that the Court will make no *adjudication* in this litigation with respect to the Basart lands. The basic claim of Utah as against the United States is simply that the exposed lands are not reliction lands. This question has nothing to do with the Basart doctrine. If the Court should determine that these exposed lands are reliction lands, it would then — and only then — be relevant to inquire as to which competing claim of reliction should prevail. But those competing claims are solely between the private claimants and the United States. Utah does not claim reliction. Utah denies reliction — and if the exposed lands are reliction lands, Utah has lost its claim of ownership.

The litigation, then, will necessarily take the following course. The Court first must determine whether the exposed lands are reliction lands. If they are not, then the United States has lost its claim of title, will get no payment for its deed to Utah, and the litigation will end there. If they are reliction lands, then Utah has lost its claim of title, will recognize conveyance of title by the deed from the United States, and the litigation will end there. In neither event will the Court ever reach any determination as to whether the Basart doctrine should apply, or proceed to any adjudication as to the competing reliction claims of the United States and the private claimants.

It must be remembered that Utah now holds whatever title the United States previously held. If Utah

loses its claim that the exposed lands are not relicted, then it will pay the United States for both the direct reliction lands and also the Basart reliction lands — without any further adjudication as to the latter.

Of course, in any subsequent litigation between Utah and the private claimants, Utah might well claim title to the Basart lands as the grantee of the United States. That question would not have been determined, and it would be a proper issue for determination in such subsequent litigation.

But this course of events certainly cannot harm Morton or any other private claimants. Indeed, exactly the same result would have followed if Utah had made a direct purchase from the United States without litigation. There is no difference in legal result between a direct purchase, or litigation to establish the necessity, or lack thereof, for payment.

The only conceivable impact on Morton and the other private claimants is that if and when the Basart question is adjudicated, it will be an adjudication between Utah (as the successor in interest of the United States) and the private claimants, rather than between the United States and the private claimants. Certainly no decree by the Court in the present proceeding will in any way enhance or improve the position of Utah subsequently to assert the Basart doctrine, beyond the present position of the United States to assert it. Likewise, nothing which will occur in this action can diminish the position of the private claimants in subsequently resisting that doctrine. And it cannot be supposed that

the private claimants are more fearful of litigation with Utah than with the United States.

If, in such subsequent litigation, the private claimants should prevail over Utah, Utah would not own the land, even though it had paid the United States for it. If Utah decided that the public interest required state ownership as to all or part of such land, then Utah would either have to buy it from, or initiate eminent domain proceedings against, such private owners.

Therefore, the only conceivable "unconscionable" result which could flow from the present litigation would be to the detriment of Utah — not the United States and not the private claimants.

The position of the private claimants has been discussed fully above. As to the United States, it cannot be harmed by the absence of the private owners, since it conveyed by *quit-claim* deed only and is entitled to payment for any interest conveyed. The United States has no duty to account at any time to any private owners for funds paid by the State of Utah for the ownership interest of the United States.

Utah, on the other hand, does have some risk in this litigation as to the 108,000 acres of Basart lands, because Utah might pay the United States for such land as a result of the present litigation, and then, as a result of subsequent litigation, find that it did not get what it paid for, and if it needs such land, face the necessity of paying for it a second time. But Utah much prefers to assume this risk of double liability compared with the alternative economic harm which would result

from having no title determination now. The latter result would be critically injurious to the mineral, industrial and recreational development of the lake, and would be far more damaging to Utah than any risk of double liability that might ultimately result from the present litigation and any subsequent title suits.

The only other potential question in this litigation in which Morton could possibly have a legitimate interest is the navigability of the Great Salt Lake. Suffice to say that the United States has not yet placed that question in issue. If it does not, there will be no determination, and Morton will not be harmed; if it does, Morton will not be bound by any such determination.

B. THE PRAGMATIC TEST OF INDISPENSABILITY AS ANNOUNCED BY PROVIDENT IS APPLICABLE TO THE CASE AT BAR.

Four days after Utah filed its printed brief on January 25, 1968, the United States Supreme Court handed down its opinion in *Provident Tradesmens Bank & Trust Co. v. Patterson,* 36 Law Week 4157 (Jan. 29, 1968). In Utah's brief the Court of Appeals decision was criticized, and it was argued that the dissenting opinion better represented the pragmatic test of indispensability as embodied in Rule 19. The Supreme Court reversed, holding that the question of indispensability is not determined as a matter of substantive right but is determined by the practical factors of each case, and citing many of the same cases, law review articles and treatises as had been cited by Utah.

The basic reason for the reversal was summarized as follows:

> Concluding that the inflexible approach adopted by the Court of Appeals in this case exemplifies the kind of reasoning that the Rule was designed to avoid, we reverse. (at page 4158)

The Court then proceeded to evaluate the four practical factors mentioned by Rule 19 which should be viewed in each case, along with any other relevant practical factors:

> First, the plaintiff has an interest in having a forum. Before the trial, the strength of this interest obviously depends upon whether a satisfactory alternative forum exists. (at page 4158)

> Second, the defendant may properly wish to avoid multiple litigation, or inconsistent relief, or sole responsibility for a liability he shares with another. (at page 4158)

> Third, there is the interest of the outsider whom it would have been desirable to join. Of course, since the outsider is not before the court, he cannot be bound by the judgment rendered. This means, however, only that a judgment is not *res judicata* as to, or legally enforceable against, a nonparty. (at page 4159)

> Fourth, there remains the interest of the courts and the public in complete, consistent, and efficient settlement of controversies. (at page 4159)

> Rule 19 (b) also directs a district court to consider the possibility of shaping relief to accommodate these four interests. (at page 4159)

It is interesting to note the Court stressed that while the generalizations of *Shields v. Barrow*, 17 How.

130 (1854) were still valid today, the Court in that case "attempted, perhaps unfortunately, to state general definitions of those persons without whom litigation could or could not proceed" (at page 4163). Further, the Court quoted with apparent approval from Reed:

> Reed, *supra*, n. 2, comments that much later difficulty could have been avoided had this Court pointed the way in *Shields* by undertaking a practical examination of the facts. *Id.*, at 340-46. He concludes that "The facts in the opinion are insufficient to demonstrate that the result is a just one." *Id.*, at 344. (at page 4163, n. 21)

At pages 40-47 of Utah's brief of January 25, 1968 the important practical aspects of the case at bar are evaluated. Morton has attempted to dismiss these practical facts as "irrelevant." They are not irrelevant, but they are in fact the very considerations which must be viewed to determine indispensability in this case. Those factors as discussed in Utah's earlier brief show that there is a critical need and an intense public interest in having some adjudication in this proceeding, the absence of any other forum, the complexity of the litigation if all of the private claimants were to be brought in, and the possibility of shaping relief so as to protect the interests of Morton and the other absent private claimants. These considerations are appropriately within the scope of Rule 19 (b), are in accord with the recent pronouncement of this court in *Provident*, and are the very matters emphasized by Reed, *Compulsory Joinder of Parties in Civil Actions*, 55 Mich. L. Rev. 327 (1957). Those practical factors need not be discussed any further here, because they are treated adequately in Utah's brief of January 25, 1968.

POINT II. IF MORTON AND THE OTHER PRIVATE CLAIMANTS ARE FOUND TO BE INDISPENSABLE, THEN:

A. TO THE EXTENT THAT PRIVATE CLAIMANTS SEEK TO CLAIM AGAINST THE STATE OF UTAH:

1. UTAH HAS NOT CONSENTED TO BE SUED, EITHER EXPRESSLY OR IMPLIEDLY.

This point also is adequately covered in Utah's brief of January 25, 1968, with the exception of two observations that have since been raised by the reply briefs of Morton and the United States.

The first has to do with express consent to suit, since Morton has cited Section 78-11-9, Utah Code Annotated (1953) as express consent by Utah to suit by Morton in this action. Whatever effect that statute might have had, it has since been repealed. Section 78-11-9 provided as follows:

> Upon the conditions herein prescribed the consent of the state of Utah is given to be named a party in any suit which is now pending or which may hereafter be brought in any court of this state or of the United States for the recovery of any property real or personal or for the possession thereof or to quiet title thereto, or to foreclose mortgages or other liens thereon or to determine any adverse claim thereon, or secure any adjudication touching any mortgage or other lien the state of Utah may have or claim on the property involved. It shall be the duty of the

> attorney general to represent the interests of the state in such cases. No judgment for costs or other money judgment shall be rendered against the state in any suit or proceeding which may be instituted under the provisions of this section nor shall the state be or become liable for the payment of costs of any such suit or proceeding or any part thereof.

In 1965 the Utah Legislature enacted a general governmental immunity act encompassing claims arising from contracts, real and personal property, and torts. Prior to that time Utah had enacted a number of statutes providing for limited waiver of governmental immunity in certain areas, but all of these provisions were repealed July 1, 1966 when the Utah Governmental Immunity Act took effect. That legislation was enacted as Chapter 139, Laws of Utah 1965, and has been codified as Chapter 30, Title 63, Utah Code Annotated (1953, as amended). Section 6 of that act (63-30-6) specifically covered exactly the same claims as former Section 78-11-9. Section 6 reads as follows:

> Immunity from suit of all governmental entities is waived for the recovery of any property real or personal or for the possession thereof or to quiet title thereto, or to foreclose mortgages or other liens or to determine any adverse claim thereon, or secure any adjudication touching any mortgage or other lien said entity may have or claim on the property involved.

Then, Section 16 vested exclusive original jurisdiction of all claims brought under the act in the state courts of Utah:

> The district courts shall have exclusive original jurisdiction over any action brought under this

> act and such actions shall be governed by the Utah rules of civil procedure insofar as they are consistent with this act.

And Section 36 provided that:

> All other acts or statutes in conflict with provisions of this act are repealed as of the effective date of this act.

Even without the express repeal, it is clear that the comprehensive governmental immunity act would effectively repeal by implication all prior statutes inconsistent therewith. For example, the rule of implied repeal is well summarized in 50 *Am. Jur.*, Statutes, Section 556:

> Repeal by Implication — As a general rule, the enactment of revisions and codes manifestly designed to embrace an entire subject of legislation, operates to repeal former acts dealing with the same subject, although there is no repealing clause to that effect. Under this rule all parts and provisions of the former act or acts, that are omitted from the revised act, are repealed, even though the omission may have been the result of inadvertence. The application of the rule is not dependent on the inconsistency or repugnancy of the new legislation and the old; for the old legislation will be impliedly repealed by the new even though there is no repugnancy between them.

In support of the above rule of repeal by implication, see *United States v. Ranlett*, 172 U.S. 133 (1898); *United States v. Allen*, 163 U.S. 499 (1896); *Kohlsaat v. Murphy*, 96 U.S. 153 (1877); *Stewart v. Kahn*, 11 Wall. 493 (1870).

The second observation has to do with implied consent to suit when a sovereign is the plaintiff. The United States has cited *United States v. Thekla*, 266 U.S. 328 (1924) in support of its position that both Utah and the United States have impliedly consented to suit by private parties in this action. The *Thekla* case was an admiralty matter, has no bearing on the case at bar, and this Court refused to apply the implied consent theory of *Thekla* to civil actions. An article ably discussing the general problem at hand is *Federal Civil Procedure and Sovereign Immunity*, 48 Cal. L. Rev. 323 (1960), wherein those cases which have suggested implied waiver were criticized:

> Basically, the *Thekla* admiralty rule is that when the United States institutes the suit it impliedly waives its immunity and hence permits an affirmative recovery by way of counter-claim against the sovereign on a claim that grows out of the subject matter of the suit. Since the rule permits affirmative recovery independent of statutory authority, it was seized upon and applied by analogy to civil suits. However, the Supreme Court in *United States v. Shaw* [309 U.S. 495 (1940)] clearly rejected any such extension and specifically limited the *Thekla* decision to claims for collision in admiralty. Notwithstanding this definitive holding restricting the rule, courts have occasionally attempted to circumvent the limitation. Such attempts have met with conspicuous failure.
>
> It seems clear then that any reliance upon the admiralty cases in civil suits as authority for an implied-waiver theory is manifestly in error. (at page 330)

See also, *United States v. Finn*, 239 F.2d 679 (9th Cir. 1956), where the Court of Appeals correctly rejected the admiralty rule of *Thekla* as inapplicable to civil suits.

2. IF PRIVATE CLAIMANTS ARE CITIZENS OF STATES OTHER THAN UTAH, CONGRESS HAS NOT IMPLEMENTED JURISDICTION FOR SUCH CLAIMS IN AN ORIGINAL ACTION.

Despite the Eleventh Amendment, there might be judicial power in the federal courts for controversies "between a State and Citizens of another State." But it is clear that Congress must implement by statute the exercise of such judicial power, and since 1948 there has been no implementing legislation. Since Morton is not a citizen of Utah, the claim against Utah cannot be maintained.

The very first federal judiciary act was enacted September 24, 1789 (1 Stat. 73), and provided in Section 13 thereof:

> That the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature, where a state is a party, except between a state and its citizens; and except also *between a state and citizens of other states*, or aliens, in which latter case it shall have original but no exclusive jurisdiction. (emphasis added)

The essence of that statute continued in effect, despite a number of subsequent amendments, until June 25, 1948, when it was amended to prevent suits

against a state by citizens of other states, but to continue to allow suits by states against citizens of other states. The pertinent part of that act, 62 Stat. 927, 928, provides in Section 1251 (b) (3) that:

> The Supreme Court shall have original but not exclusive jurisdiction of . . . all actions or proceedings *by a State against the citizens of another State* or against aliens. (emphasis added)

This provision is codified as part of 28 U.S.C., Section 1251. The *Historical and Revision Notes* following Section 1251 of Title 28, U.S.C.A., provides at page 2:

> Sections 341 and 371 of Title 28, U.S.C. 1940 ed., were not wholly consistent with such constitutional provisions. Said section 341 provided that the Supreme Court shall have original jurisdiction of controversies *between a State and citizens of other States* or aliens, *whereas the 11th Amendment prohibits an action in any Federal court against a State* by citizens of another State or aliens. (emphasis added)

Whatever the merit, or lack of merit, of the above observation that the amendment made the statute consistent with the constitutional provisions, the important fact is that Congress did amend the statute to eliminate suits *against* states by citizens of other states, while retaining jurisdiction for actions brought by states against citizens of other states. Congress has often revised the extent to which the federal judicial power shall be exercised by the federal courts. For example, when cases arise under the Constitution, laws or treaties of the United States, or when cases are between citizens of different states, the judicial power cannot be exer-

cised unless the amount in controversy exceeds $10,000.00 (28 U.S.C. 1331, 1332).

Thus, there is no statutory implementation of judicial power in original actions for suits *against* a state by citizens of another state, and this Court cannot entertain the claim which Morton seeks to assert against Utah.

3. IF PRIVATE CLAIMANTS ARE CITIZENS OF UTAH, THERE IS NO JURISDICTION FOR SUCH CLAIMS TO BE HEARD IN AN ORIGINAL ACTION.

While the United States admits at page 11 of its memorandum that it does "not understand the rationale" of the California case, it seems to be suggested by the United States that the jurisdiction determination expressed by that case is a judicially created rule which may or may not be applied, depending on the discretion of the Court.

This is a basic misconception. The holding of the *California* case was very fundamental. The United States Constitution does not grant judicial power to the federal courts to entertain suits between a state and its citizens, except when a question arises under the Constitution, laws or treaties of the United States. As to those cases, the jurisdiction of the United States Supreme Court is appellate only. Thus, neither can Congress provide for, nor can the Supreme Court elect to take, original jurisdiction in cases between a state and its citizens. Such jurisdiction could only be created by an amendment to the federal Constitution.

There should be no mystery as to the reason why no judicial power is conferred on federal courts in actions between a state and its own citizens. The cases cited hereafter make it very clear that the framers of the Constitution thought that the state courts should be adequate to handle such cases, and there was no need for federal judicial power. The Court has also made it abundantly clear that in original actions the case will be limited to the *named parties* in the grant of jurisdiction, and to the named parties *only*. To bring in other parties, either where there is no judicial power, or where there is judicial power but jurisdiction is appellate, would circumvent and frustrate the constitutional limitations on original jurisdiction.

The absence of jurisdiction in original actions between a State and its own citizens was not an innovation of the Court in *California v. Southern Pacific*. A clear recognition and lucid explanation of this particular jurisdictional limitation was made by the Court as early as 1821 in *Cohens v. Virginia, infra*. Utah initially pointed to the *California* case only because of its similarity to the case at bar with respect to jurisdictional limitations, not to suggest that the Court was there for the first time recognizing those jurisdictional limitations. In Utah's printed brief on file with the Court, the basis of the particular jurisdictional limitation under discussion was explained and cases were cited without elaboration. It now appears that some elaboration is necessary.

Article III, Section 2, United States Constitution, provides:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States, — between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or subjects.
>
> In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Supreme Court has construed the foregoing language in a great number of cases, and from them the following basic principles can fairly be summarized.

> I. The measure, limit and extent of the judicial power of the Courts of the United States is the grant contained in Article III, Section 2, United States Constitution, as quoted above.
>
> II. Paragraph 1 of Section 2 *confers* the judicial power, and paragraph 2 *distributes* the judicial power between appellate and original jurisdiction in the United States Supreme Court. The original jurisdiction distributed in paragraph 2 includes *only* those cases where judicial power is conferred by paragraph 1, and the appellate

jurisdiction, distributed in paragraph 2, is likewise limited to those cases where judicial power is conferred by paragraph 1.

III. The *grant of judicial power* and the *distribution of jurisdiction* include the following cases only (omitting references to ambassadors, public ministers, consuls, admiralty and maritime jurisdiction):

A. Original Jurisdiction in Supreme Court:

1. Cases between two or more states;

2. Cases between a state and citizens of another state;

3. Cases between a state and foreign states, citizens or subjects.

B. Appellate Jurisdiction in Supreme Court:

1. Cases requiring judicial construction of the United States Constitution or a federal statute or treaty (this is the so-called "federal question" jurisdiction);

2. Cases where the United States is a Party;

2. Cases between citizens of different states (this is the so-called "diversity" jurisdiction);

4. Cases between citizens of the same state claiming lands under separate grants of different states;

5. Cases between the citizens of a state and foreign states, citizens or subjects.

IV. The constitutional grant of judicial power bases jurisdiction upon either the *character of the parties* to the action or the *character of the subject matter* of the action. *All* original jurisdiction cases (itemized under III A above) are

dependent upon the character of the state as a party, and such jurisdiction exists between the named parties *only*. Appellate jurisdiction is also dependent upon the character of the parties in all cases, except (1) "federal question" (required construction of federal constitution, treaty or statute) cases, and (2) land title disputes between citizens of the same state (this is essentially a subject matter category, although it operates in practical effect as an exception to "diversity" jurisdiction—the latter jurisdiction being dependent upon the character of the parties rather than upon the subject matter.)

V. Where jurisdiction is based on the character of the parties, it is entirely unimportant what the subject matter may be—the subject matter is wholly irrelevant to jurisdiction. Where jurisdiction is based on the character of the subject matter of the case, it is totally immaterial who the parties are. (If the United States or a state should be a party, there might be an additional jurisdictional question with respect to consent to suit. But that is an entirely different question which has no bearing on the present question of a constitutional grant of jurisdiction.)

VI. The original jurisdiction of the Supreme Court is not exclusive by virtue of the Constitution, and Congress is empowered to confer concurrent original jurisdiction on inferior federal courts.

VII. There is jurisdiction in an original action for suits between the United States and a state.

Original action jurisdiction is implemented by 28 U.S.C. § 1251, which provides as follows:

(a) The Supreme Court shall have original and exclusive jurisdiction of:

(1) All controversies between two or more States;

(2) All actions or proceedings against ambassadors or other public ministers of foreign states or their domestics or domestic servants, not inconsistent with the law of nations.

(b) The Supreme Court shall have original but not exclusive jurisdiction of:

(1) All actions or proceedings brought by ambassadors or other public ministers of foreign states or to which consuls or vice consuls of foreign states are parties;

(2) All controversies between the United States and a State;

(3) All actions or proceedings by a State against the citizens of another State or against aliens.

With this preliminary background, attention will now be given to the judicial decisions of the United States Supreme Court.

Shortly after the United States Constitution was adopted, the Court was called on to decide *Chisholm v. Georgia,* 2 Dallas 419 (1793), in which it was held that the State of Georgia could be sued on a debt by an individual citizen of another state, and that the State of Georgia would be amenable to suit without respect to whether it consented to such suit. Since § 2 of Article III granted judicial power in cases "between a State and Citizens of another State," it appeared to a majority of the Court that there was a clear grant of judicial power for the action, and that by accepting and ratifying the Constitution, the states, at least impliedly, con-

sented to suit where specific judicial power was conferred on the United States courts.

The decision in *Chisholm v. Georgia, supra,* created such a wave of angry protest among the citizenry that at the very next session of Congress, steps were taken to promulgate what was to become the Eleventh Amendment to the United States Constitution, and which was intended, in effect, to render null and void the opinion of the Supreme Court to prevent suits such as that sustained in *Chisholm v. Georgia.*

The Eleventh Amendment provides:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State. (Declared ratified January 8, 1798.)

Following the adoption of the Eleventh Amendment, the next significant case dealing with the original jurisdiction of the United States Supreme Court was *Marbury v. Madison,* 1 Cranch 137 (1803), wherein it was stated:

> If it had been intended to leave it in the discretion of the legislature to apportion the judicial power between the supreme and inferior courts according to the will of that body, it would certainly have been useless to have proceeded further than to have defined the judicial power, and the tribunals in which it should be vested. The subsequent part of the section is mere surplusage, is entirely without meaning, if such is to be the construction. If congress remains at liberty to give this court appellate jurisdiction, where the constitution has declared their jurisdiction shall

be original; and original jurisdiction where the constitution has declared it shall be appellate; the distribution of jurisdiction, made in the constitution, is form without substance.

Affirmative words are often, in their operation, negative of other objects than those affirmed; and in this case, a negative or exclusive sense must be given to them, or they have no operation at all.

It cannot be presumed that any clause in the constitution is intended to be without effect; and, therefore, such a construction is inadmissible, unless the words require it.

If the solicitude of the convention, respecting our peace with foreign powers, induced a provision that the supreme court should take original jurisdiction in cases which might be supposed to affect them; yet the clause would have proceeded no further than to provide for such cases, if no further restriction on the powers of congress had been intended. That they should have appellate jurisdiction in all other cases, with such exceptions as congress might make, is no restriction; unless the word be deemed exclusive of original jurisdiction.

When an instrument organizing fundamentally a judicial system, divides it into one supreme, and so many inferior courts as the legislature may ordain and establish; then enumerates its powers, and proceeds so far to distribute them, as to define the jurisdiction of the supreme court by declaring the cases in which it shall take original jurisdiction, and that in others it shall take appellate jurisdiction; the plain import of the words seems to be, that in one class of cases its jurisdiction is original, and not appellate; in the other it is appellate, and not original. If any other construction would render the clause in-

> operative, that is an additional reason for rejecting such other construction, and for adhering to their obvious meaning.

The Court thus explained that the jurisdiction of the United States Supreme Court was carefully defined and limited in the grant of judicial power by the Constitution, and that the extent to which the court could exercise such judicial power in an original action was strictly limited by the distribution clause, and that said clause prevented the court from exercising jurisdiction to issue a writ of mandamus to the Secretary of State of the United States.

Eighteen years later, the court decided *Cohens v. Virginia*, 6 Wheat. 264 (1821), wherein Mr. Chief Justice Marshall discussed at great length the original and appellate jurisdiction of the United States Supreme Court. While the case, including the syllabus, is approximately 200 pages in length, the most pertinent language to the issue at hand appears at pages 378, 390-394. Though the quotes are rather lengthy, the language is so fundamental to a proper understanding of the present issue, and is so explanatory as to the rationale for the rule, that it is advisable to set forth the Court's explanation:

> The first question to be considered is, whether the jurisdiction of this Court is excluded by the character of the parties, one of them being a State, and the other a citizen of that State?
>
> The second question of the third article of the constitution defines the extent of the judicial power of the United States. Jurisdiction is given to the Courts of the Union in two classes of cases. In the first, their jurisdiction depends on

the character of the cause, whoever may be the parties. This class comprehends "all cases in law and equity arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority." This clause extends the jurisdiction of the Court to all the cases described, without making in its terms any exception whatever, and without any regard to the condition of the party. If there be any exception, it is to be implied against the express words of the article.

In the second class, the jurisdiction depends entirely on the character of the parties. In this are comprehended "controversies between two or more States, between a State and citizens of another State," . . . "and between a State and foreign States, citizens or subjects." If these be the parties, it is entirely unimportant what may be the subject of controversy. Be it what it may, these parties have a constitutional right to come into the Courts of the Union. (at page 378)

* * *

It has been also urged, as an additional objection to the jurisdiction of the Court, that cases between a State and one of its own citizens, do not come within the general scope of the constitution; and were obviously never intended to be made cognizable in the federal Courts. The State tribunals might be suspected of partiality in cases between itself or its citizens and aliens, or the citizens of another State, but not in proceedings by a State against its own citizens. That jealousy which might exist in the first case, could not exist in the last, and therefore the judicial power is not extended to the last.

This is very true, so far as jurisdiction depends on the character of the parties; and the argument would have great force if urged to prove that this Court could not establish the

demand of a citizen upon his State, but is not entitled to the same force when urged to prove that this Court cannot inquire whether the constitution or laws of the United States protect a citizen from a prosecution instituted against him by a State. If jurisdiction depended entirely on the character of the parties, and was not given where the parties have not an original right to come into Court, that part of the 2d section of the 3d article, which extends the judicial power to all cases arising under the constitution and laws of the United States, would be mere surplusage. It is to give jurisdiction where the character of the parties would not give it, that this very important part of the clause was inserted. It may be true, that the partiality of the State tribunals, in ordinary controversies between a State and its citizens, was not apprehended, and therefore the judicial power of the Union was not extended to such cases; but this was not the sole nor the greatest object for which this department was created. A more important, a much more interesting object, was the preservation of the constitution and laws of the United States, so far as they can be preserved by judicial authority; and therefore the jurisdiction of the Courts of the Union was expressly extended to all cases arising under that constitution and those laws. If the constitution or laws may be violated by proceedings instituted by a State against its own citizens, and if that violation may be such as essentially to affect the constitution and the laws, such as to arrest the progress of government in it constitutional course, why should these cases be excepted from that provision which expressly extends the judicial power of the Union to *all* cases arising under the constitution and laws?

After the bestowing on this subject the most attentive consideration, the Court can perceive

no reason founded on the character of the parties for introducing an exception which the constitution has not made; and we think that the judicial power, as originally given, extends to all cases arisng under the constitution or a law of the United States, whoever may be the parties.

It has been also contended, that this jurisdiction, if given, is original, and cannot be exercised in the appellate form.

The words of the constitution are, "in all cases affecting ambassadors, other public ministers, and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction."

This distinction between original and appellate jurisdiction, excludes, we are told, in all cases, the exercise of the one where the other is given.

The constitution gives the Supreme Court original jurisdiction in certain enumerated cases, and gives it appellate jurisdiction in all others. Among those in which jurisdiction must be exercised in the appellate form, are cases arising under the constitution and laws of the United States. These provisions of the constitution are equally obligatory, and are to be equally respected. If a State be a party, the jurisdiction of this Court is original; if the case arise under a constitution or a law, the jurisdiction is appellate. But a case to which a State is a party may arise under the constitution or a law of the United States. What rule is applicable to such a case? What, then, becomes the duty of the Court? Certainly, we think, so to construe the constitution as to give effect to both provisions, as far as it is possible to reconcile them, and not to permit their seeming repugnancy to destroy each

other. We must endeavour so to construe them as to preserve the true intent and meaning of the instrument.

In one description of cases, the jurisdiction of the Court is founded entirely on the character of the parties; and the nature of the controversy is not contemplated by the constitution. The character of the parties is every thing, the nature of the case nothing. In the other description of cases, the jurisdiction is founded entirely on the character of the case, and the parties are not contemplated by the constitution. In these, the nature of the case is every thing, the character of the parties nothing. When, then, the constitution declares the jurisdiction, in cases where a State shall be a party, to be original, and in all cases arising under the constitution or a law, to be appellate—the conclusion seems irresistible, that its framers designed to include in the first class those cases in which jurisdiction is given, because a State is a party; and to include in the second, those in which jurisdiction is given, because the case arises under the constitution or a law.

This reasonable construction is rendered necessary by other considerations.

That the constitution or a law of the United States, is involved in a case, and makes a part of it, may appear in the progress of a cause, in which the Courts of the Union, but for that circumstance, would have no jurisdiction, and which of consequence could not originate in the Supreme Court. In such a case, the jurisdiction can be exercised only in its appellate form. To deny its exercise in this form is to deny its existence, and would be to construe a clause, dividing the power of the Supreme Court, in such manner, as in a considerable degree to defeat the power itself. All must perceive, that this construction can be justified only where it is absolutely neces-

sary. We do not think the article under consideration presents that necessity.

It is observable, that in this distributive clause, no negative words are introduced. This observation is not made for the purpose of contending, that the legislature may "apportion the judicial power between the Supreme and inferior Courts according to its will." That would be, as was said by this Court in the case of *Marbury v. Madison*, to render the distributive clause "mere surplusage," to make it "form without substance." This cannot, therefore, be the true construction of the article.

But although the absence of negative words will not authorize the legislature to disregard the distribution of the power previously granted, their absence will justify a sound construction of the whole article, so as to give every part its intended effect. It is admitted, that "affirmative words are often, in their operation, negative of other subjects than those affirmed;" and that where "a negative or exclusive sense must be given to them, or they have no operation at all," they must receive that negative or exclusive sense. But where they have full operation without it; where it would destroy some of the most important objects for which the power was created; then, we think, affirmative words ought not to be construed negatively.

The constitution declares, that in cases where a State is a party, the Supreme Court shall have original jurisdiction; but does not say that its appellate jurisdiction shall not be exercised in cases where, from their nature, appellate jurisdiction is given, whether a State be or be not a party. It may be conceded, that where the case is of such a nature as to admit of its originating in the Supreme Court, it ought to originate there; but where, from its nature, it cannot originate

> in that Court, these words ought not to be so construed as to require it. There are many cases in which it would be found extremely difficult, and subversive of the spirit of the constitution, to maintain the construction, that appellate jurisdiction cannot be exercised where one of the parties might sue or be sued in this Court.

As observed by the Court in the *Cohens* case, Article III of the United States Constitution does not contemplate cases between a state and one of its own citizens if jurisdiction is dependent upon the character of the parties, but if jurisdiction is founded on the subject matter of the case (in that a federal constitutional, statutory or treaty provision is involved), then it is entirely immaterial who the parties are, and jurisdiction will exist even though the case may be one between a state and its own citizens. In the latter situation, where jurisdiction would exist by virtue of the subject matter, the Supreme Court would have appellate jurisdiction only. Mr. Justice Marshall concluded that the states, by ratifying and accepting the Constitution, had impliedly consented to such suits (if consent was necessary at all). It was further observed that the primary reason why there was no grant of jurisdiction as to the character of the parties between a state and its own citizens was because a citizen reasonably could expect a fair and impartial judicial proceeding in his own state. But if it became necessary for a citizen of one state to bring suit against another state, it was less likely that the private citizen of the sister state could expect the same impartiality in the courts of the state being sued as he might expect in the courts of his own state. Consequently, as between a state and a citizen of another

state, there was a direct grant of jurisdiction to the federal courts; whereas, as between a state and one of its own citizens, there was no grant at all of jurisdiction to the federal courts.

The observations of the Court in the *Cohens* case were made in light of the *Chisholm* decision and the adoption of the Eleventh Amendment. Then, in 1824, the court decided *Osborn v. Bank of the United States*, 9 Wheat. 738 (1824). It was there held that while a state could not be sued by the United States to prevent the state from collecting an unconstitutional tax on the United States Bank (because of the prohibition of the Eleventh Amendment), the action could be maintained against the officers of the state to prevent the execution of the laws providing for the illegal tax levy. This holding has since been modified to the extent that now a suit in form against governmental officials but in substance against the sovereign will be viewed as a suit directly against the sovereign. See, for example, *Minnesota v. Hitchcock* and *New Mexico v. Lane*, *infra*.

Thirty years later, in *Florida v. Georgia*, 17 How. 478 (1854), the Court considered a boundary dispute between the named states. The United States Attorney General sought to intervene to represent the interests of the United States and the interest of all of the other states of the United States in a proper boundary line determination which would protect the interests of the United States. Since the action was initially filed as an original proceeding in the United States Supreme Court, jurisdiction was properly based upon the character of the parties, since they were both states. But when

the United States sought to intervene, there was no provision in the distribution clause for original actions which included the United States as a party. Such suits had to be commenced in the lower federal courts and reach the United States Supreme Court only through the exercise of its appellate jurisdiction.

Fearful that the Court would be ousted of jurisdiction if the United States were allowed to intervene as a party, the Court simply permitted the United States Attorney General to appear as *amicus curiae* to represent the interests of the United States, on the rationale that such a positon would not make the United States a party of record and would not oust the Court of jurisdiction.

Justice Curtis, dissenting, reasoned that the United States in substance was a party even though in form appeared as *amicus curiae* and, therefore, the United States should be viewed as an actual party and the jurisdiction of the Court would, therefore, be ousted. Justice Curtis further argued that all cases involving states (where jurisdiction was founded on the character of the parties) had to be original actions and all cases in which the United States was a party had to be appellate actions—and that this was specifically intended so that the United States and a state could never sue each other. Since they were both sovereigns, Justice Curtis thought it inconceivable that they should bring suit against each other and believed that the Constitution had intended to prevent this. This is to say that if every case in which the United States is a party must be filed in the lower federal courts, and every case in which a state is a party must be filed in an original action in the

United States Supreme Court, there could never be jurisdiction in any court to entertain such a suit between the two sovereigns. The following quote from the dissenting opinion is useful, not only because the majority opinion is silent as to the issue, but because of the subsequent impact of *United States v. Texas, infra.*

> The judicial power of the United States, extends, among other things, to controversies to which the United States shall be a party—to controversies between two or more States—between a State and citizens of other States or of foreign states, where the State commences the suit, and between a State and foreign states.
>
> In distributing this jurisdiction, the constitution has provided that, in all cases in which a state shall be a party, the supreme court shall have original jurisdiction. In all other cases before mentioned, the supreme court shall have appellate jurisdiction. One of the other cases before mentioned, is a controversy to which the United States is a party.
>
> I am not aware that any doubt has ever been entertained by any one, that controversies to which the United States are a party, come under the appellate jurisdiction of this court in this distribution of jurisdiction by the constitution. Such is the clear meaning of the words of the constitution. So it was construed by the congress, in the judiciary act of 1789, which, by the 11th section conferred on the circuit courts jurisdiction of cases in which the United States are plaintiffs, and so it has been administered to this day.
>
> * * *
>
> The decision of this court, in Marbury v. Madison, 1 Cranch, 137, settled this construction of

the constitution; and, as stated in this note, no one who has examined the subject now questions it.

We have, then, two rules given by the constitution. The one, that if a State be a party, this court shall have original jurisdiction; the other, that if the United States be a party, this court shall have only appellate jurisdiction. And we are as clearly prohibited from taking original jurisdiction of a controversy to which the United States is a party, as we are commanded to take it if a State be a party. Yet, when the United States shall have been admitted on this record to become a party to this controversy, both a State and the United States will be parties to the same controversy. And if each of these clauses of the constitution is to have its literal effect, the one would require and the other prohibit us from taking jurisdiction.

It is not to be admitted that there is any real conflict between these clauses of the constitution, and our plain duty is so to construe them that each may have its just and full effect. This is attended with no real difficulty. When, after enumerating the several distinct classes of cases and controversies to which the judicial power of the United States shall extend, the constitution proceeds to distribute that power between the supreme and inferior courts, it must be understood as referring, throughout, to the classes of cases before enumerated, as distinct from each other.

And when it says: "in all cases in which a State shall be a party, the supreme court shall have original jurisdiction," it means, in all the cases before enumerated in which a State shall be a party. Indeed, it says so, in express terms, when it speaks of the other cases where appellate jurisdiction is given.

So that this original jurisdiction, which depends solely on the character of the parties, *is confined to the cases in which are those enumerated parties, and those only.* (emphasis added)

It is true, this course of reasoning leads necessarily to the conclusion that the United States cannot be a party to a judicial controversy with a State in any court.

* * *

Take the case of a suit between a citizen of Florida and a citizen of Georgia, in the course of which it appears that an inhabitant of this district who is not competent to sue or capable of being sued, has such an interest in the controversy that the court can make no decree between the parties before them without affecting that interest; has it ever been supposed that there was any implied power granted by the constitution and the 11th section of the judiciary act of 1789 to make him a party, or has the conclusion been that in all such cases the court cannot act at all? The latter, I apprehend, is the settled conclusion. The forty-seventh rule for the equity practice of the circuit courts provides, that if persons who might otherwise be deemed necessary or proper parties to the suit cannot be made so, because their joinder would oust the jurisdiction of the court, as to the parties before the court, the court may, in its discretion, proceed in the cause without making such persons parties; and in such cases the decree shall be without prejudice to the rights of the absent parties. This certainly assumes that there is no implied power, arising out of the necessity of the case, to make them parties, or to bring them into the cause so as to hear and bind them without making them parties. The court is to distribute all the justice it can between the parties over whom it has jurisdiction; but if it can do

> nothing without the presence of a necessary party, the remedy is not to bring him in, or allow him to come in, but to refuse to act, and leave the parties to terminate their dispute by other means. This is declared by this court in Hagan v. Walker, 14 How. 36, and the earlier cases lead to the same conclusion. Russell *v.* Clarke's Ex'rs, 7 Cr. 98; Cameron *v.* Roberts, 3 Wheat. 591; Wormley *v.* Wormley, 8 ibid, 451; Carneal *v.* Banks, 10 ibid, 188; West *v.* Randall, 2 Mason, 195, 196; Shields *et al. v.* Barrow, *ante*, p. 130, of the present term.

In *Pennsylvania v. Quicksilver Co.*, 10 Wall. 553 (1870), it was held that a state was empowered to bring an original suit in the United States Supreme Court as a moving party against a citizen of another state, but it could not include within such action citizens of its own state. While the rationale was somewhat lacking in clarity, the holding obviously was predicated on the plain fact that there was no jurisdiction to entertain an original action between a state and its own citizens.

In 1875, the Court decided *Florida v. Anderson*, 91 U.S. 667 (1875), wherein it was held that Florida could commence an original action in the United States Supreme Court against citizens of Georgia, and could further name as a *formal* party-defendant the United States Marshal for the Northern District of Florida, who was a resident of Florida and who had in his possession an execution. It was made clear, however, that if the citizen of Florida had been a real party in interest, rather than merely a formal party, the jurisdiction of the Court would have been destroyed by the act of the state joining as a real defendant one of its own citizens.

In *Ames v. Kansas*, 111 U.S. 449 (1884), the Court reviewed at some length earlier decisions relating to original jurisdiction, and concluded that Congress was empowered to vest inferior federal courts with concurrent original jurisdiction.

The next decision of consequence to the issue under discussion was *Hans v. Louisiana*, 134 U.S. 1 (1889), wherein the Court modified part of the dictum in *Cohens v. Virginia*, *supra*, by holding that a state could not be sued without its consent by one of its own citizens even when jurisdiction was based on the *subject matter* of the action. This was not an *original* action. The Court reviewed the history of the impact of the *Chisholm v. Georgia* decision and the manner in which it precipitated the passage of the Eleventh Amendment, concluding that since the people had so clearly manifested their feeling that a state should not be subjected to suit by a citizen of another state in the federal courts without the consent of the state thus being sued, it must be equally clear that a state could not be sued by its own citizens in a federal court without its consent.

The Court was careful to make clear that the jurisdiction which existed for a citizen to sue his own state with its consent was by virtue of the *subject matter* of the suit and not by virtue of the character of the state as a party. The latter jurisdictional consideration is entirely different from the immunity of a state to suit until it has expressly so consented. The *Hans* decision seemed to effectively change the *Cohens* doctrine that states impliedly consent to suits by their own citizens by adopting the Constitution, when jurisdiction is

founded on the subject matter of the suit. Pertinent extracts from the *Hans* opinion are quoted below:

> The question is presented, whether a State can be sued in a Circuit Court of the United States by one of its own citizens upon a suggestion that the case is one that *arises under the Constitution or laws of the United States.* (emphasis added)
>
> The ground taken is, that under the Constitution, as well as under the act of Congress passed to carry it into effect, a case is within the jurisdiction of the federal courts, *without regard to the character of the parties,* if it arises under the Constitution or laws of the United States, or, which is the same thing, if it necessarily involves a question under said Constitution or laws. The language relied on is that clause of the 3d article of the Constitutoin, which declares that "the judicial power of the United States shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;" and the corresponding clause of the act conferring jurisdiction upon the Circuit Court, which, as found in the act of March 3, 1875, 18 Stat. 470, c. 137, § 1, as follows, to wit: "That the Circuit Courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature at common law or in equity, . . . arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority." *It is said that these jurisdictional clauses make no exception arising from the character of the parties, and, therefore, that a State can claim no exemption from suit, if the case is really one arising under the Constitution, laws or treaties of the United States. It is conceded that where the jurisdiction depends alone upon the character of the parties,*

a controversy between a State and its own citizens is not embraced within it; but it is contended that though jurisdiction does not exist on that ground, it nevertheless does exist if the case itself is one which necessarily involves a federal question; and with regard to ordinary parties this is undoubtedly true. The question now to be decided is, whether it is true where one of the parties is a State, and is sued as a defendant by one of its own citizens. (emphasis added)

That a State cannot be sued by a citizen of another State, or of a foreign state, on the mere ground that the case is one arising under the Constitution or laws of the United States, is clearly established by the decisions of this court in several recent cases. *Louisiana v .Jumel,* 107 U.S. 711; *Hagood v .Southern,* 117 U.S. 52; *In re Ayers,* 123 U.S. 443. Those were cases arising under the Constitution of the United States, upon laws complained of as impairing the obligation of contracts, one of which was the constitutional amendment of Louisiana complained of in the present case. Relief was sought against state officers who professed to act in obedience to those laws. This court held that the suits were virtually against the State themselves and were consequently violative of the Eleventh Amendment of the Constitution, and could not be maintained. It was not denied that they presented cases arising under the Constitution; but, notwithstanding that, they were held to be prohibited by the amendment referred to.

In the present case the plaintiff in error contends that he, being a citizen of Louisiana, is not embarrassed by the obstacle of the Eleventh Amendment, inasmuch as that amendment only prohibits suits against a State which are brought by the citizens of another State, or by citizens or subjects of a foreign State. It is true, the

amendment does so read: and if there were no other reason or ground for abating his suit, it might be maintainable; and then we should have this anomalous result, that in cases arising under the Constitution or laws of the United States, a State may be sued in the federal courts by its own citizens, though it cannot be sued for a like cause of action by the citizens of other States, or of a foreign state; and may be thus sued in the federal courts, although not allowing itself to be sued in its own courts. If this is the necessary consequence of the language of the Constitution and the law, the result is no less startling and unexpected than was the original decision of this court, that under the language of the Constitution and of the judiciary act of 1789, a State was liable to be sued by a citizen of another State, or of a foreign country. That decision was made in the case of *Chisholm v. Georgia,* 2 Dall. 419, and created such a shock of surprise throughout the country that, at the first meeting of Congress thereafter, the Eleventh Amendment to the Constitution was almost unanimously proposed, and was in due course adopted by the legislatures of the States. This amendment, expressing the will of the ultimate sovereignty of the whole country, superior to all legislatures and all courts, actually reversed the decision of the Supreme Court. It did not in terms prohibit suits by individuals against the States, but declared that the Constitution should not be construed to import any power to authorize the bringing of such suits. The language of the amendment is that "the judicial power of the United States shall *not be construed to extend to* any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State or by citizens or subjects of any foreign state." The Supreme Court has construed the judicial power as extend-

ing to such a suit,and its decision was thus overruled. . . .

* * *

It seems to us that these views of those great advocates and defenders of the Constitution were most sensible and just; and they apply equally to the present case as to that then under discussion. The latter is appealed to now, as it was then, as a ground for sustaining a suit brought by an individual against a State. The reason against it is as strong in this case as it was in that. It is an attempt to strain the Constitution and the law to a constructon never imagined or dreamed of. Can we suppose that, when the Eleventh Amendment was adopted, it was understood to be left open for citizens of a State to sue their own state in the federal courts, whilst the idea of suits by citizens of other states, or of foreign states, was indignantly repelled? Suppose that Congress, when proposing the Eleventh Amendment, had appended to it a proviso that nothing therein contained should prevent a State from being sued by its own citizens *in cases arising under the Constitution or laws of the United States*: can we imagine that it would have been adopted by the State? The supposition that it would is almost an absurdity on its face. (emphasis added)

* * *

Some reliance is placed by the plaintiff upon the observations of Chief Justice Marshall, in *Cohens v. Virginia*, 6 Wheat. 264, 410. The Chief Justice was there considering the power of review exercisable by this court over the judgments of a state court, wherein it might be necessary to make the State itself a defendant in error. He showed that this power was absolutely necessary in order to enable the judiciary of the United States to take cognizance of all cases arising under the Constitution and laws of the United

States. He also showed that making a State a defendant in error was entirely different from suing a State in an original action in prosecution of a demand against it, and was not within the meaning of the Eleventh Amendment; that the prosecution of a writ of error against a State was not the prosecution of a suit in the sense of that amendment, which had reference to the prosecution, by suit, of claims against a State. "Where," said the Chief Justice, "a State obtains a judgment against an individual, and the court rendering such judgment overrules a defence set up under the Constitution or laws of the United States, the transfer of this record into the Supreme Court for the sole purpose of inquiring whether the judgment violates the Constitution of the United States, can, with no propriety, we think, be denominated a suit commenced or prosecuted against the State whose judgment is so far reexamined. Nothing is demanded from the State. No claim against it of any description is asserted or prosecuted. The party is not to be restored to the possession of any thing. . . . He only asserts the constitutional right to have his defence examined by that tribunal whose province it is to construe the Constitution and laws of the Union. . . . The point of view in which this writ of error, with its citation, has been considered uniformly in the courts of the Union, has been well illustrated by a reference to the course of this court in suits instituted by the United States. The universally received opinion is that no suit can be commenced or prosecuted against the United States; that the judiciary act does not authorize such suits. Yet writs of error, accompanied with citations, have uniformly issued for the removal of judgments in favor of the United States into a superior court. . . . It has never been suggested that such writ of error was a suit against the

United States, and, therefore, not within the jurisdiction of the appellate court."

After thus showing by incontestable argument that a writ of error to a judgment recovered by a State, in which the State is necessarily the defendant in error, is not a suit commenced or prosecuted against a State in the sense of the amendment, he added, that if the court were mistaken in this, its error did not affect that case, because the writ of error therein was not prosecuted by "a citizen of another State" or "of any foreign state," and so was not affected by the amendment; but was governed by the general grant of judicial power, as extending "to all cases arising under the Constitution or laws of the United States, without respect to parties." p. 412.

It must be conceded that the last observation of the Chief Justice does favor the argument of the plaintiff. But the observation was unnecessary to the decision, and in that sense *extra judicial*, and though made by one who seldom used words without due reflection, ought not to outweigh the important considerations referred to which lead to a different conclusion. With regard to the question then before the court, it may be observed, that writs of error to judgments in favor of the crown, or of the State, had been known to the law from time immemorial; and had never been considered as exceptions to the rule, than an action does not lie against the sovereign.

It must be remembered that the *Hans* opinion was concerned with a case arising "under the Constitution, laws or treaties of the United States." As such, jurisdiction was founded on the *subject matter* of the case—not on the character of the parties. Necessarily then,

the case originated in the lower federal court and reached the Supreme Court on appeal. Jurisdiction thus existed for a citizen to sue his own state in a *subject matter* case, but such jurisdiction could not be exercised until the state consented to the suit. The important thing to remember is that if jurisdiction would have been based on the character of the parties, the case would have had to come within the original jurisdiction of the Supreme Court—and there would have been no jurisdiction for such a suit between a state and one of its own citizens. It would not have been a question of consent or lack of consent—it would simply have been a lack of jurisdiction, irrespective of consent. Thus, speaking of the constitutional grant of judicial power, the Court in *Hans* said:

> It is conceded that where the jurisdiction depends alone upon the character of the parties, a controversy between a state and its own citizens is not embraced within it; . . .

The United States Supreme Court next decided *United States v. Texas,* 143 U.S. 621 (1892), wherein it was held for the first time that the United States could bring an original action against a state for the determination of boundary lines with respect to disputed territory. In so doing, the Court justified jurisdiction by an interesting combination of constitutional provisions. The Court first concluded that the *distribution* of jurisdiction was founded on the character of the parties so as to permit the exercise of *original* jurisdiction (basing this conclusion upon the fact that a state was a party in its character as a state). The Court next concluded that the *grant* of jurisdiction

was by virtue of the fact that the United States was a party. While the jurisdiction of the Supreme Court ordinarily would be *appellate* by virtue of such *grant* of judicial power, the presence of Texas as a state justified the original action. Two justices dissented, being of the opinion that the original jurisdiction of the court could not be so exercised. The pertinent part of the majority opinion, as well as the dissenting opinion, is quoted below:

> * * * The important question therefore, is, whether this court can, under the Constitution, take cognizance of an original suit brought by the United States against a State to determine the boundary between one of the Territories and such State. Texas insists that no such jurisdiction has been conferred upon this court, and that the only mode in which the present dispute can be peaceably settled is by agreement, in some form, between the United States and that State. Of course, if no such agreement can be reached—and it seems that one is not probable—and if neither party will surrender its claim of authority and jurisdiction over the disputed territory, the result, according to the defendant's theory of the Constitution, must be that the United States, in order to effect a settlement of this vexed question of boundary, must bring its suit in one of the courts of Texas—that State consenting that its courts may be open for the assertion of claims against it by the United States—or that, in the end, there must be a trial of physical strength between the government of the Union and Texas. The first alternative is unwarranted both by the letter and spirit of the Constitutoin. Mr. Justice Story has well said: "It scarcely seems possible to raise a reasonable doubt as to the propriety of giving to the national courts jurisdiction of cases in which the

United States are a party. It would be a perfect novelty in the history of national jurisprudence, as well as of public law, that a sovereign had no authority to sue in his own courts. Unless this power were given to the United States, the enforcement of all their rights, powers, contracts and privileges in their sovereign capacity would be at the mercy of the States. They must be enforced, if at all, in the state tribunals." Story Const. § 1674. The second alternative, above mentioned, has no place in our constitutional system, and cannot be contemplated by any patriot except with feelings of deep concern.

The cases in this court show that the framers of the Constitution did provide, by that instrument, for the judicial determination of all cases in law and equity between two or more States, including those involving questions of boundary. Did they omit to provide for the judicial determination of controversies arising between the United States and one or more of the States of the Union? This question is in effect answered by *United States v. North Carolina*, 136 U.S. 211. This was an action of debt brought in this court by the United States against the State of North Carolina, upon certain bonds issued by that State. The State appeared, the case was determined here upon its merits, and judgment was rendered for the State. It is true that no question was made as to the jurisdiction of this court, and nothing was therefore said in the opinion upon that subject. But it did not escape the attention of the court, and the judgment would not have been rendered except upon the theory that this court has original jurisdiction of a suit by the United States against a State. As, however, the question of jurisdiction is vital in this case, and is distinctly raised, it is proper to consider it upon its merits.

The constitution extends the judicial power of the United States to all cases, in law and equity, arising under this Constitution, the laws of the United States and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; between citizens of different states; between citizens of the same State claiming lands under grants of different States, and between a State or the citizens thereof and foreign States, citizens or subjects.

"In all cases, affecting ambassadors or other public ministers and consuls, and those in which a State shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make." Art. 3 § 2. "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State." 11th Amendment.

It is apparent upon the face of these clauses that in one class of cases the jurisdiction of the courts of the Union depends "on the character of the cause, whoever may be the parties," and, in the other, on the character of the parties, whatever may be the subject of the controversy. *Cohens v. Virginia,* 6 Wheat. 264, 378, 393. The present suit falls in each class, for it is, plainly, one arising under the Constitution, laws and treaties of the United States, and, also, one in which the United States is a party. It is, there-

fore, one to which, by the express words of the Constitution, the judicial power of the United States extends. That a Circuit Court of the United States has not jurisdiction, under existing statutes, of a suit by the United States against a State, is clear; for by the Revised Statutes it is declared—as was done by the Judiciary Act of 1789—that "the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature where a State is a party, except between a State and its citizens, or between a State and citizens of other States or aliens, in which latter cases it shall have original, but not exclusive jurisdiction." Rev. Stat. § 687; Act of September 24, 1789, c. 20, § 13; 1 Stat. 80. Such exclusive jurisdiction was given to this court, because it best comported with the dignity of a State, that a case in which it was a party should be determined in the highest, rather than in a subordinate judicial tribunal of the nation. Why then may not this court take original cognizance of the present suit involving a question of boundary between a Territory of the United States and a State?

* * *

MR. CHIEF JUSTICE FULLER, with whom concurred MR. JUSTICE LAMAR, dissenting.

MR. JUSTICE LAMAR and myself are unable to concur in the decision just announced.

This court has original jurisdiction of two classes of cases only, those affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party.

The judicial power extends to "controversies between two or more States;" "between a State and citizens of another State;" and "between a

> State or the citizens thereof, and foreign States, citizens or subjects." Our original jurisdiction, which depends solely upon the character of the parties, is confined to the cases enumerated, in which a State may be a party, and this is not one of them.
>
> The judicial power also extends to controversies to which the United States shall be a party, but such controversies are not included in the grant of original jurisdiction. To the controversy here the United States is a party.
>
> We are of the opinion, therefore, that this case is not within the original jurisdiction of the court.

The Court in *United States* v. *Texas* was thus faced with two dilemmas. The first related to jurisdiction, for the Constitution said that in all cases involving the United States as a party, the Supreme Court had appellate jurisdiction only, and in all cases involving a state as a party, the jurisdiction was and had to be original. Literally applied, these provisions would make it impossible for the United States and a state ever to join in the same action in a federal court. The second dilemma was a practical one. If no federal jurisdiction existed, it was thought that the only resolution of the boundary dispute between Texas and the United States would be by suit in the state courts of Texas, by treaty, or by war. The practical dilemma was easily solved—by finding jurisdiction in the *original* action. But the dilemma of jurisdiction was not so easily solved. The Court was seemingly compelled to an illogical conclusion: It found the *grant* of jurisdiction to exist by virtue of the character of the United States as a party, and it then found *original* jurisdiction by virtue of the character of the State of Texas as a

party. If the distribution of jurisdiction is to be relied upon, it is then necessary to find the *grant*. Nothing more is distributed than granted. The dissent seemed to reason that, since there was no *grant* of jurisdiction for suits between the United States and a state, there could be no *distribution* of such jurisdiction; and, since the only applicable grant of jurisdiction related to the character of the United States as a party—as relied upon by the majority of the Court—it was necessary to trace the grant from the grant clause to the distribution clause to determine whether the exercise of such jurisdiction was to be original or appellate. The dissenting justices concluded that such jurisdiction was clearly appellate and not original.

It is noteworthy that since a federal question existed as to the interpretation of a treaty of the United States, jurisdiction could have been founded on the subject matter of the action, and the character of the parties would have been immaterial. Of course, the case would then have to originate in the lower federal courts and reach the United States Supreme Court on appeal.

Be that as it may, the law is now clearly settled that the original jurisdiction of the Supreme Court encompasses suits between a state and the United States. The foregoing quotes and analysis have been included because they are useful to illustrate the Court's struggle with jurisdictional questions concerning the character of the parties (and since the case at bar is between a state and the United States).

In *California* v. *Southern Pacific Company*, 157 U.S. 229 (1895), the next significant case decided, the

State of California brought suit against a corporate citizen of another state to quiet title to certain water front lands in the vicinty of Oakland city. It appeared that the City of Oakland and the Oakland Water Front Company, both citizens of the State of California, had or claimed to have interests in the real property subject to the litigation, and the interests of such entities would be concluded, as a practical matter, by any decision or decree of the Court. The Supreme Court found the City of Oakland and the Oakland Water Front Company to be indispensable parties, and concluded that the case could not be determined effectively without their presence. But the Court then noted that to include such citizens of California as parties would destroy jurisdiction in an original action, carefully pointing out the distinction between jurisdiction founded on the character of the parties and jurisdiction founded on the subject matter of the action.

While some claim was made by the parties that federal questions were present in that the federal constitution would have to be construed and applied to determine the constitutionality of certain state laws, the Court correctly observed that jurisdiction was founded on the *character of the parties* when the original suit was commenced, and that such jurisdiction must fail if citizens of California were to be joined as parties. This was so because, if jurisdiction had been based on a federal question rather than on the character of the parties, such jurisdiction would then have been appellate only, and the original jurisdiction of the Court still would have been defeated. Because of the similarity of that case to the instant case, rather lengthy excerpts

are quoted below from the main, concurring and dissenting opinions:

> This brings us to consider what the effect would be if the Oakland Water Front Company and the city of Oakland were made parties defendant. The case would then be between the State of California on the one hand and a citizen of another State and citizens of California on the other. Could this court exercise original jurisdiction under such circumstances?
>
> By the first paragraph of section two of article III of the Constitution it is provided that "the judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; . . . to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; between citizens of different States . . ." And by the second clause that "in all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction . . ." The language, "in all cases in which a State shall be party," means in all the cases above enumerated in which a State shall be a party, and this is stated expressly when the clause speaks of the other cases where appellate jurisdiction is to be exercised. This second clause distributes the jurisdiction conferred in the previous one into original and appellate jurisdiction, but does not profess to confer any. The original jurisdiction depends solely on the character of the parties, and is confined to the cases in which are those *enumerated parties and those*

only. Among those in which jurisdiction must be exercised in the appellate form are cases arising under the Constitution and laws of the United States. In one description of cases the character of the parties is everything, the nature of the case nothing. In the other description of cases the nature of the case is everything, the character of the parties nothing. *Cohens v. Virginia*, 6 Wheat. 264, 393. (emphasis added)

We are aware of no case in which this court has announced the conclusion that power is conferred on Congress to authorize suits against citizens of other States joined with citizens of the same State as that of which plaintiff is a citizen to be originally commenced in, or to be removed to, the Circuit Courts, as arising under the Constitution on the ground indicated, where there is no separable controversy or the citizens of plaintiff's State are indispensable parties, *but we are not called on to consider that question, or whether any Federal question is involved*, since the original jurisdiction of this court in cases between a State and citizens of another State rests *upon the character of the parties and not at all upon the nature of the case*. (emphasis added)

If, by virtue of the subject-matter, a case comes within the judicial power of the United States, it does not follow that it comes within the original jurisdiction of this court. That jurisdiction does not obtain simply because a State is a party. Suits between a State and its own citizens are not included within it by the Constitution; nor are controversies between citizens of different States. (emphasis added)

It was held at an early day that Congress could neither enlarge nor restrict the original jurisdiction of this court, *Marbury v. Madison*, 1 Cranch, 137, 173, 174, and no attempt to do so is suggested here. The jurisdiction is limited

and manifestly intended to be sparingly exercised, and should not be expanded by construction. *What Congress may have power to do in relation to the jurisdiction of Circuit Courts of the United States is not the question, but whether, where the Constitution provides that this court shall have original jurisdiction in cases in which the State is plaintiff and citizens of another State defendants, that jurisdiction can be held to embrace a suit between a State and citizens of another State and of the same State. We are of opinion that our original jurisdiction cannot be thus extended, and that the bill must be dismissed for want of parties who should be joined, but cannot be without ousting the jurisdiction.* (emphasis added) *Bill dismissed.*

MR. JUSTICE FIELD concurring. It is greatly to be regretted that the controversies between the State of California, the Southern Pacific Railway Company, and the city of Oakland cannot now, in view of the limited character of the original jurisdiction of the Supreme Court of the United States, be heard, determined, and settled by this court, for those controversies will be a fruitful source of disturbance and vexation to the interests of the State until they are thus determined and settled. But, from the views of the court expressed in its recent decision, proceedings for such determination and settlement must find their commencement in the courts of the State, and can only reach this court from their decision upon appeal or writ of error. And the sooner proceedings are taken to reach that disposition of the controversies the earlier will be their final settlement.

MR. JUSTICE HARLAN, with whom concurred MR. JUSTICE BREWER, dissenting.

In my judgment it is competent for the court, in the exercise of its original jurisdiction, to pro-

ceed to a final decree in this cause that will determine the present controversy between the State of California and the Southern Pacific Company.

By the second section of the third article of the Constitution it is declared that the judicial power of the United States shall extend "to all cases in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States, between a State and citizens of another State, between citizens of different States, between citizens of the same State claiming lands under grants of different States, and between a State or the citizens thereof and foreign States, citizens, or subjects." And it is provided in the same section that "in all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make."

It is beyond dispute that the case before us presents a controversy between the State of California and a corporation created under the laws of the Commonwealth of Kentucky, and therefore, a controversy between a State and a citizen of another State. And as the judicial power of the United States extends to such a controversy, and as this court is invested with original jurisdiction "in *all* cases," to which the judicial power of the United States extends, in which a

> State is a party, I do not see how we can escape the obligation imposed by the Constitution, to hear this cause upon its merits, and pass such decree as will determine at least the matters in dispute between California and this Kentucky corporation.

In *Minnesota v. Hitchcock,* 185 U.S. 373 (1902), the State of Minnesota, claiming title, filed an original action to enjoin the Secretary of Interior and the Commissioner of the General Land Office from selling certain lands included within an Indian reservation. No party contested jurisdiction, but jurisdiction purportedly was founded on the character of the parties in that the Secretary of the Interior and the Commissioner of the General Land Office were citizens of states other than Minnesota, and so the action assumed the complexion of a state bringing suit as a moving party against citizens of another state. The Supreme Court raised the question of jurisdiction on its own initiative, and rejected the argument that jurisdiction was so founded, pointing out that the United States was in substance the real defendant and that the action was by a state against the United States. But the Court concluded that the United States may be sued *with its consent* and that a state may file such an action against the United States as an original action, relying essentially on the decision in *United States v. Texas,* 143 U.S. 621, *supra.* The relevant part of the *Minnesota v. Hitchcock* decision is quoted below:

> A preliminary question is one of jurisdiction. It is true counsel for defendants did not raise the question, and evidently both parties desire that the court should ignore it and dispose of the case on the merits. But the silence of counsel does

not waive the question, nor would the express consent of the parties give to this court a jurisdiction which was not warranted by the Constitution and laws. *It is the duty of every court of its own motion to inquire into the matter irrespective of the wishes of the parties, and be careful that it exercises no powers save those conferred by law. Consent may waive an objection so far as respects the person, but it cannot invest a court with a jurisdiction which it does not by law possess over the subject matter.* The question having been suggested by the court, a brief has been presented, and our jurisdiction sought to be sustained on several grounds. The question is one of the original and not of the appellate jurisdiction. The pertinent constitutional provisions are found in section 2 of article III, as follows: (emphasis added)

"The judicial power shall extend to all cases in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; between citizens of different States; between citizens of the same State claiming lands under grants of different States, and between a State or the citizens thereof and foreign States, citizens or subjects.

"In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned the Supreme Court shall have appellate jurisdiction, both as to law and fact,

with such exceptions and under such regulations as the Congress shall make."

The first of these paragraphs defines the matters to which the judicial power of the United States extends, and the second divides the original and appellate jurisdiction of this court. By the latter paragraph this court is given original jurisdiction of those cases "in which a State shall be a party." This paragraph, distributing the original and appellate jurisdiction of this court, is not to be taken as enlarging the judicial power of the United States or adding to the cases or matters to which by the first paragraph the judicial power is declared to extend. The question is, therefore, not finally settled by the fact that the State of Minnesota is a party to this litigation. It must also appear that the case is one to which by the first paragraph the judical power of the United States extends. There are three clauses in the first paragraph which call for notice; one, that which extends the judicial power of the United States to controversies "between a State and citizens of another State;" second, that which extends it "to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;" and, third, that which extends it to controversies "to which the United States shall be a party."

* * *

We omit, as unnecessary to the disposition of this case, any consideration of the applicability of the first two clauses, because we think the case comes within the scope of the third clause, and we need not now go further. This is a controversy to which the United States may be regarded as a party. It is one, therefore, to which the judicial power of the United States extends. It is, of course, under that clause a matter of indifference whether the United States is a party plaintiff or

> defendant. It could not fairly be adjudged that the judicial power of the United States extends to those cases in which the United States is a party plaintiff and does not extend to those cases in which it is a party defendant.
>
> The case of *United Staies v. Texas,* 143 U.S. 621, is in point, and upon many aspects of the question very suggestive. That was a suit brought by the United States against the State of Texas to determine the title to a tract, called the county of Greer, which was claimed by the State to be within its limits and a part of its territory, and by the United States to be outside the State of Texas and belonging to the United States. The jurisdiction of this court was challenged, but was sustained.

Also in 1902, the Court decided *Minnesota v. Northern Securities Company,* 184 U.S. 199 (1902), wherein it was held that even though jurisdiction was properly founded in the first instance between the state and a citizen of another state, there were indispensable parties who were citizens of the State of Minnesota. The Court would be ousted of jurisdiction by bringing such parties into the action, since then the state would be claiming against some of its own citizens in an original action. The suit had to be dismissed. The pertinent part of the opinion is quoted below, although the Court does not elaborate at any length on the rationale for the ruling on jurisdiction:

> The narrative of the bill unquestionably discloses that the parties to be affected by a decision of the controversy are, directly, the State of Minnesota, *the Great Northern Railway Company, the Northern Pacific Railway Company, corporations of that State,* and the Northern Securities Company, a corporation of the State of New

Jersey, and, indirectly, the stockholders and bondholders of those corporations, and of the numerous railway companies whose lines are alleged to be owned, managed or controlled by the Great Northern and Northern Pacific Railway Companies. (emphasis added)

* * *

Upon investigation it might turn out that the allegations of the bill are well founded, and that the State is entitled to relief: or it might turn out that there is no intention or design on the part of the railroad companies to form any combination in disregard of the policy of the State, but that what is proposed is consistent with that policy and advantageous to the communities affected. But, in making such investigation, a court of equity must insist that both sides of the controversy shall be adequately represented and fully heard.

When it appears to a court of equity that a case, otherwise presenting ground for its action, cannot be dealt with because of the absence of essential parties, it is usual for the court, while sustaining the objection, to grant leave to the complainant to amend by bringing in such parties. But when it likewise appears that necessary and indispensable parties are beyond the reach of the jurisdiction of the court, or that, when made parties, the jurisdiction of the court will thereby be defeated, for the court to grant leave to amend would be useless. Sec. 2 of Article 3 of the Constitution of the United States.

As then, the Great Northern and the Northern Pacific Railway Companies are indispensable parties, without whose presence the court, acting as a court of equity, cannot proceed, and as our constitutional jurisdiction would not extend to the case if those companies were made parties defendant, the motion for leave to file the proposed bill must be and is *Denied.*

In *New Mexico v. Lane*, 243 U.S. 52 (1917), the State of New Mexico filed suit against the Secretary of Interior and the Commissioner of the General Land Office to enjoin an issuance of a proposed patent by the United States. The suit, in effect, was by the State of New Mexico against the United States and is very similar to the case just discussed of *Minnesota v. Hitchcock, supra.* But in the *New Mexico* case, the person to whom the patent would issue and who had made an entry and paid the purchase price for the land in question was a citizen of the State of New Mexico. Although he had not been made a party to the action, the Court concluded that he was an indispensable party and that the suit could not proceed without his presence. But to permit a citizen of New Mexico to be brought in as a party in a position contrary to that asserted by the State of New Mexico would destroy the jurisdiction of the Court, because jurisdiction was based on the *character* of the parties. Since original jurisdiction would not exist if the entryman were to be included, the case was, therefore, dismissed, citing as authority *California v. Southern Pacific Company, supra.* The concluding paragraph of the *New Mexico* case is quoted below, because, while no rationale is expressed, the conclusion is clear:

> It would seem, besides, that under the averments of the bill Keepers is an indispensable party, he having become, according to the bill, a purchaser of the land and paid the purchase price thereof. To make him a party would oust this court of jurisdiction, if he is a citizen of New Mexico, and the presumption expressed by defendant that he is, complainant does not deny. *California v. Southern Pacific Co.*, 157 U.S. 229.
>
> ***Dismissed.***

In *Duhne v. New Jersey*, 251 U.S. 311 (1920), a citizen of New Jersey sought to file an original action against the State of New Jersey and others. The Court rejected the filing of the complaint, making the general observation that the original jurisdiction of the court did not encompass a suit brought by a citizen against his own state *without its consent*. The Court cited as authority *California v. Southern Pacific* and some of the other cases discussed above, but its observation was confusing with respect to lack of consent. Consent has nothing to do with the judicial power of the Court in an original action involving a state and its own citizens. There is no such jurisdiction, irrespective of consent. The Court could have better clarified its holding by separating the two issues, and pointing out that New Jersey had not consented to the suit, and, even if it had, there would be no original jurisdiction between a state and one of its own citizens. Nevertheless, since the case is relevant to the present issue, the memorandum opinion is quoted below:

> Memorandum opinion by MR. CHIEF JUSTICE WHITE, by direction of the court.
>
> The complainant, a citizen of New Jersey, asked leave to file an original bill against the Attorney General of the United States, the Commissioner of Internal Revenue thereof and the United States District Attorney for the District of New Jersey, as well as the State of New Jersey. The bill sought an injunction restraining the United States officials named and the State of New Jersey, its officers and agents, from in any manner directly or indirectly enforcing the Eighteenth Amendment to the Constitution of the United States, any law of Congress or statute

of the State to the contrary, on the ground that that Amendment was void from the beginning and formed no part of the Constitution.

Answering a rule to show cause why leave to file the bill should not be granted, if any there was, the defendants, including the State of New Jersey, denied the existence of jurisdiction to entertain the cause and this is the first question for consideration.

So far as the controversy concerns the officials of the United States, is is obvious that the bill presents no question within the original jurisdiction of this court and in effect that is not disputed since in substance it is conceded that the bill would not present a case within our original jurisdiction if it were not for the presence of the State of New Jersey as a defendant. But it has been long since settled that the whole sum of the judicial power granted by the Constitution to the United States does not embrace the authority to entertain a suit brought by a citizen against his own State without its consent. *Hans v. Louisiana*, 134 U.S. 1; *North Carolina v. Temple*, 134 U.S. 22; *California v. Southern Pacific Co.*, 157 U.S. 229; *Fitts v. McGhee*, 172 U.S. 516, 524.

It is urged, however, that although this may be the general rule, it is not true as to the original jurisdiction of this court, since the second clause of § 2, Article III, of the Constitution, confers original jurisdiction upon this court "in all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party." In other words, the argument is that the effect of the clause referred to is to divest every State of an essential attribute of its sovereignty by subjecting it without its consent to be sued in every case if only the suit is originally brought in this court. Here again the error arises from treating the language of the clause as crea-

tive of jurisdiction instead of confining it to the rule long since announced as follows: "This second clause distributes the jurisdiction conferred in the previous one into original and appellate jurisdiction, but does not profess to confer any. The original jurisdiction depends solely on the character of the parties, and is confined to the cases in which are those enumerated parties and those only." *Louisiana v. Texas*, 176 U.S. 1, 16. That is to say, the fallacy of the contention consists in overlooking the fact that the distribution which the clause makes relates solely to the grounds of federal jurisdiction previously conferred and hence solely deals with cases in which the original jurisdiction of this court may be resorted to in the exercise of the judicial power as previously given. In fact, in view of the rule now so well settled as to be elementary, that the federal jurisdiction does not embrace the power to entertain a suit brought against a State without its consent, *the contention now insisted upon comes to the proposition that the clause relied upon provides for the exercise by this court of original jurisdiction in a case where no federal judicial power is conferred.* (emphasis added)

As the want of jurisdiction to entertain the bill clearly results, it follows that the permission to file must be and it is denied and our order is,

Rule discharged.

In *Texas v. Interstate Commerce Commission and Railroad Labor Board*, 258 U.S. 158 (1921), it was held, on the authority of *California v. Southern Pacific Company* and *Minnesota v. Northern Securities Company, supra*, that certain citizens of the State of Texas were indispensable parties and had not been joined in the original action, but to so join them would defeat the jurisdiction of the court. The complaint was, there-

fore, dismissed. The conclusion of that opinion is quoted below:

> * * * They [certain absent persons deemed indispensable] are not parties to the bill, and as to all but one the bill makes it clear that their citizenship is an obstacle to making them such. This, without more, would preclude us from awarding any relief on this portion of the bill. *California v. Southern Pacific Co., supra; Minnesota v. Northern Securities Co., supra.*

The most recent case touching on the precise question under discussion is *Louisiana v. Cummins*, 314 U.S. 577 (1941), which is a *per curiam* decision, issued as follows:

> Leave to file the complaint is denied for want of jurisdiction, it appearing that one of the named parties defendant is a citizen of Louisiana. *California v. Southern Pacific Co.*, 157 U.S. 229, 256-262; *Minnesota v. Northern Securities Co.*, 184 U.S. 199, 238; *New Mexico v. Lane*, 243 U.S. 52, 58; *Texas v. Interstate Commerce Commission*, 258 U.S. 158, 163. The rule to show cause is discharged.

The cases cited above and the accompanying explanations and interpretations are believed accurately to set forth the constitutional basis for the limitation on original actions in the United States Supreme Court which prevents citizens of a state claiming against their own state, or vice versa. That principle has been recognized and applied by every decision of the United States Suupreme Court where the issue has been raised.

The primary difficulty experienced by the United States in its memorandum appears to stem from its failure to recognize that there is no grant of jurisdiction

to the federal judiciary for suits between a state and its own citizens when jurisdiction is dependent on the character of the parties. The failure to recognize this basic principle leads to considerable confusion in failing to distinguish properly between original and appellate jurisdiction and in failing to appreciate the further jurisdictional significance of subject matter cases and character of the parties cases.

Thus, on pages 9-11 of its memorandum, the United States cites *California v. Southern Pacific Company*, *Minnesota v. Northern Securities Company*, and *Louisiana v. Cummins* (all cited and discussed, *supra*, in this memorandum), contending that in these cases only "local law issues" were involved and there was "no federal question." That observation is really quite meaningless, since in each case jurisdiction was founded on the character of the parties (as indeed it had to be to sustain *original* jurisdiction). That being the case, the subject matter was entirely immaterial—whether issues of local law or otherwise.

Another observation made by the United States (at page 9) was that perhaps in cases between a state and citizens of another state, there must be "complete diversity," and to include citizens of the state would destroy diversity—and thus destroy jurisdiction. This observation is not too far afield but is incorrectly characterized. It is true that in certain instances diversity of citizenship is a constitutional requirement, and if diversity is destroyed, jurisdiction is destroyed. Somewhat similar is the present case, where to include citizens of Utah would be to create an action not comprehended by the Constitution — and thus beyond the original

jurisdiction of the Court. If the question were really a "diversity" question, the Court would have so classified it, and it has not.

The final argument suggested by the United States (at page 11) is that even if original jurisdiction "of a *federal question case* to which a state is a party is defeated by joinder of citizens of that state as adverse parties, . . . an independent ground of federal jurisdiction is the presence of the United States as a party, . . ." This argument is pregnant with misconceptions and contradictions. In the first place, there are *no* "federal question" cases which are cognizable as original actions—all original actions are and must be based on the character of the parties. In the second place, where jurisdiction is dependent upon the United States as a party (the suggested "independent ground"), such jurisdiction is appellate only, and cannot be exercised in an original action. Even in *United States v. Texas*, *supra*, and cited by the United States, the Court suggested no such result.

On the contrary, the Court had to ride both Texas and the United States Roman style, depending on the United States for a grant of judicial power and depending on Texas for original jurisdiction. Both horses were necessary. Without the Texas footing, the case would have fallen from the original action forum; and without the United States footing, the Court would have been without any judicial power. This is explained at greater length in the excerpts from that case, *supra*.

If the United States suggested any further arguments, or any other distinctions for the *California* case

they are not readily reflected by a reading of its memorandum.

The United States has failed to suggest a single argument, distinction or rationale which is justified or supported by any case remotely resembling the case at bar.

B. TO THE EXTENT THAT PRIVATE CLAIMANTS SEEK TO CLAIM AGAINST THE UNITED STATES:

1. THE UNITED STATES HAS NOT CONSENTED TO BE SUED, EITHER EXPRESSLY OR IMPLIEDLY.

It is believed that Utah's brief of January 25, 1968 adequately covers this point. It was there pointed out that the legislative history of the Great Salt Lake Lands Act was clear in showing that Congress intended only Utah and the United States to be parties to this litigation. But the United States now contends that if the United States can be joined as "a" defendant, it must be supposed that Congress anticipated other defendants. This is without merit, and flies in the face of the very explicit quotes from congressional hearings which were included in Utah's earlier brief. But in that regard, perhaps one additional excerpt would be in order. On March 9, 1966 the Committee on Interior and Insular Affairs met in session to discuss the subject bill, and T. Richard Witmer, legal counsel for the Committee, made the following explanation concerning this litigation:

> Mr. Rivers: Mr. Chairman, could I ask a question?

The Chairman. Yes.

Mr. Rivers. Mr. Witmer, third parties might benefit in that resolving the controversy between the Federal Government and the State would enable a private person trying to clear his title to deal with one government instead of two.

Mr. Witmer. That is right, if there are any conflicting claims between the United States and third parties. I am not aware that there are, but if there are it would certainly aid them because they would have only one, namely the State to deal with.

Mr. Rivers. In any case, then, they would end up under this amendment of yours with the problem of clearing their title only with respect to the State. They would not have to make the Federal Government a party in interest or party defendant, would they?

Mr. Witmer. As they probably could not in any event.

Mr. King. Would the gentleman yield?

Mr. Rivers. Yes.

Mr. King. What the gentleman says is absolutely correct and, as a matter of fact, there are definitely some conflicts between private individuals and the Federal Government.

Mr. Witmer. Might I stand corrected then.

Mr. King. This is a cause of considerable concern to them so that they would greatly benefit by the enactment of this amendment.

Mr. Rivers. One more question, Mr. Witmer. You said we were endeavoring to fix that boundary once and for good based on a survey under which the Federal Government would take the whole section if it already held a major part and

the State, likewise, would get the whole section if it already had—

Mr. Witmer. Or half-section, if that is what the parties agree on, or quarter-section.

Mr. Rivers. Now, then, suppose the lake goes down some more after this boundary line is established. Would reliction apply hereafter, after the establishment of this firm boundary line?

Mr. Witmer. My answer to that is, no; that section 1 says we hereby convey everything to you, all right, title, and interest, and that will include any rights, titles, or interest which may be based on reliction in the future.

Mr. Rivers. And the rights of private parties down around the lake there, if the lake gets lower.

Mr. Witmer. They will just have to argue that out with the State.

Mr. Rivers. Very good. Thank you.

Published Hearings, House Committee on Interior and Insular Affairs, re HR 1791 and HR 6267, 89th Congress, pp. 180-81

With respect to the question of implied consent to suit by the United States, it has already been pointed out under Point II (A) (1) of this brief, *supra*, that the cases relied on by the United States were admiralty cases, which have been specifically rejected by this Court as inapplicable to civil actions.

2. THERE IS NO JURISDICTION IN AN ORIGINAL ACTION FOR CONTROVERSIES BETWEEN THE UNITED STATES AND A CITIZEN OF A STATE.

There is no jurisdiction in an original action in this Court for Morton to claim against the United States. Morton has no jurisdictional standing in an original action, and if Morton claims against the United States, then the only conceivable jurisdiction must be founded on the United States as a party. But that jurisdiction is appellate, not original. Original actions will be limited to the named parties in Article II, Section 2, and to the named parties only. There plainly and simply is no distribution of jurisdiction in an original action for a claim by a citizen against the United States. The cases cited and discussed under Point II (A) (3) of this brief, *supra,* are fully relevant to this argument.

POINT III. THE MOTION TO INTERVENE BY GREAT SALT LAKE MINERALS AND CHEMICALS CORPORATION SHOULD BE DENIED.

Though the position expressed by Great Salt Lake Minerals and Chemicals Corporation (referred to herein as GSL) is generally favorable to the position of the State of Utah, Utah resists such intervention, whether permissive or as a matter of right. Utah's response to that motion is as follows:

1. To the extent that intervention is based on common questions of law and fact, Utah adequately represents the interests of GSL, a mineral lessee of Utah;

2. To the extent that GSL is fearful that in the future it might have lease problems with either Utah or the United States, such claims not only would com-

plicate and confuse this proceeding, but they are too premature, uncertain, remote and speculative to be susceptible to any adjudication in this action; and

3. To the extent that GSL seeks to claim as a riparian owner of fee land adjacent to the surveyed meander, Utah adopts its printed brief of January 25, 1968, in its entirety as its opposition to such attempt.

CONCLUSION

Neither Morton nor GSL is an indispensable party to this litigation. Neither has a right to intervene, and neither should be permitted to intervene. Further, denial of intervention will preserve the jurisdiction of the Court and permit a speedy determination between Utah and the United States as to what lands, if any, the United States deeded to Utah.

Respectfully submitted,

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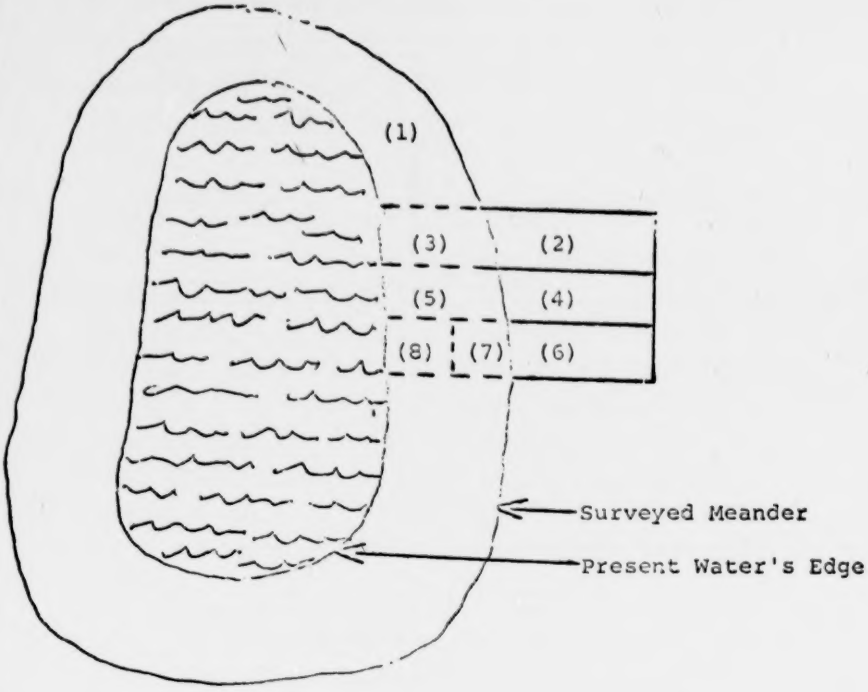
February 23, 1968

ILLUSTRATIVE DIAGRAM



EXPLANATORY:

The various classifications of exposed land around the Great Salt Lake can be demonstrated by the numbered areas above as identified by the description of each area as set forth below. The estimated acreages are rough approximations, and the actual acreages would vary from day to day and from month to month with the fluctuating water level of the lake.

(1) Belt of approximately 600,000 acres of exposed land circling the lake, situated between present water's edge and surveyed meander line .

(2) Fee land where ownership retained by the United States.

(3) Claim of United States to 325,000 acres as direct reliction land.

(4) Fee land patented to private person when water's edge was at or near surveyed meander.

(5) Claim of private persons to 167,000 acres as direct reliction lands—not in issue in this litigation.

(6) Fee land patented to private person when water's edge was substantially below surveyed meander.

(7) Substantial land exposed at date of patent. Broken line between (7) and (8) represents water's edge at date of patent.

(8) Land exposed since date of patent. Total land in (7) and (8) combined represents about 108,000 acres, is claimed by both United States and private claimants, and is the only category of land which creates the indispensable party question.

CERTIFICATE OF SERVICE

I, Phil L. Hansen, Attorney General of, and counsel for, the State of Utah, and a member of the Bar of this Court, do hereby certify that copies of the foregoing brief of the State of Utah were served upon the Solicitor General of the United States of America, Department of Justice, Washington, D.C. 20530; Frank A. Wollaeger, 110 North Wacker Drive, Chicago, Illinois 60606, and Martin Jacobs, 17 Pennsylvania Avenue, N.W., Washington, D. C. 20006, attorneys for Morton International, Inc.; and, George E. Boss, 10 Exchange Place, Salt Lake City, Utah 84111, and Robert D. Larsen, 1730 K Street, N.W., Washington, D.C., 20006, attorneys for Great Salt Lake Minerals and Chemicals Corporation; by mailing the same, air mail postage prepaid, to their respective offices, this 23rd day of February, 1968, all in accordance with the Rules of this Court.

PHIL L. HANSEN
Attorney General
State of Utah

Counsel for State of Utah

PREME COURT, U. S.

FILED
APR 16 1968

No. 31, ORIGINAL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

STATE OF UTAH, *Plaintiff*,

v.

UNITED STATES OF AMERICA, *Defendant*.

BRIEF OF MORTON INTERNATIONAL, INC. IN RESPONSE TO STIPULATION AND SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

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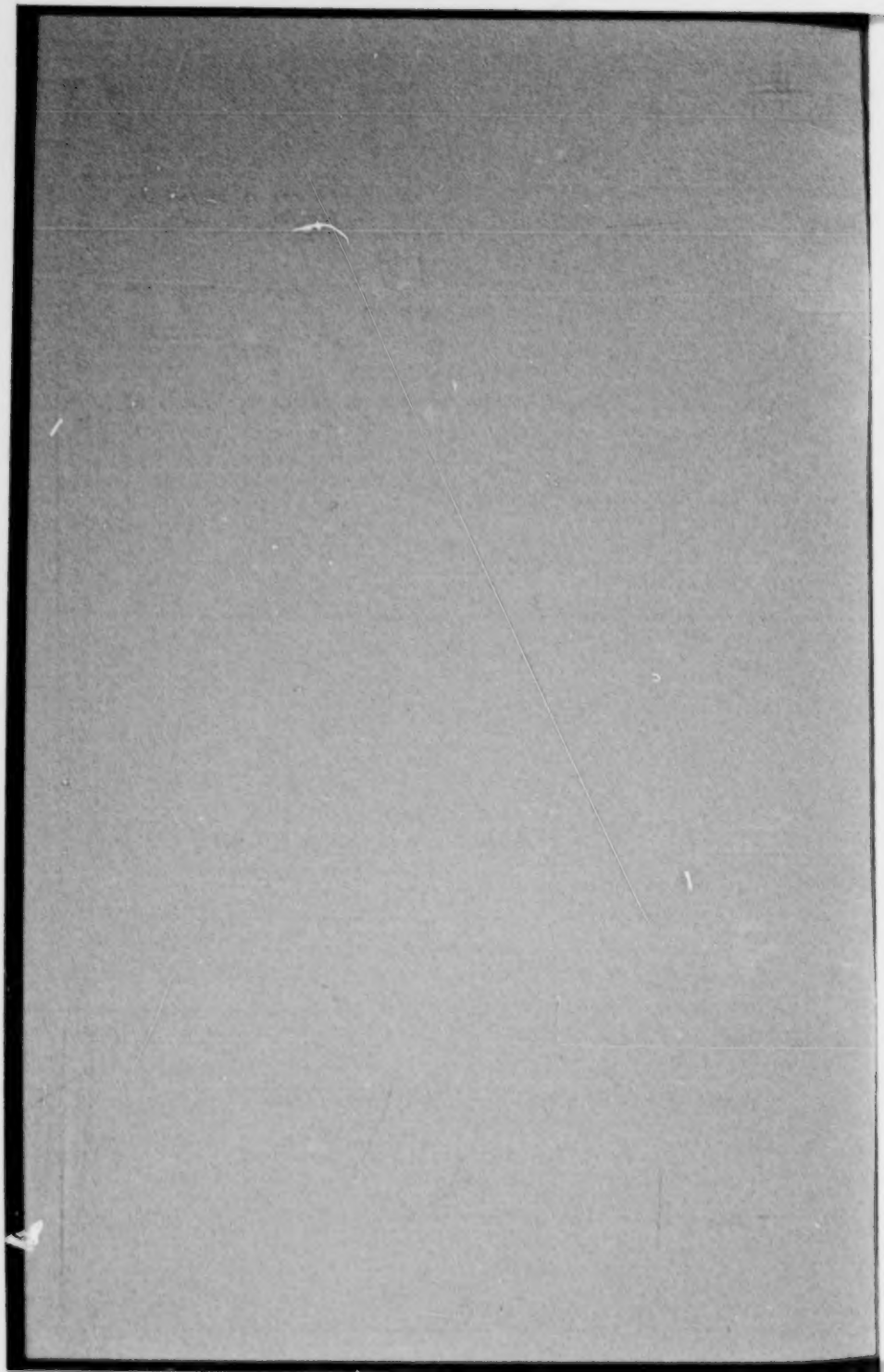

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No. 31, ORIGINAL

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STATE OF UTAH, *Plaintiff*,

v.

UNITED STATES OF AMERICA, *Defendant*.

BRIEF OF MORTON INTERNATIONAL, INC. IN RESPONSE TO STIPULATION AND SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

This brief is submitted by MORTON INTERNATIONAL, INC. (hereinafter referred to as "Morton") in response to the Stipulation dated March, 1968, between the United States and the State of Utah and in response to the Supplemental Memorandum filed by the United States regarding the effect of said Stipulation on Morton's motion for leave to intervene, presently before the Special Master.

ARGUMENT

I. THE STIPULATION HAS NO EFFECT ON MORTON'S INDISPENSABILITY AND REQUIRED INTERVENTION

The United States has abruptly reversed its position with respect to Morton's motion to intervene. Without amending the complaint previously filed by the State of Utah or the answer filed by the United States, counsel for those parties have now entered into a stipulation for the purpose of purportedly "limiting the scope of the present litigation." This agreement, in the Government's view, converts Morton from its previous position in this litigation as an indispensable party to an unnecessary party. We disagree that the stipulation has such effect (assuming, *arguendo*, that the stipulation is valid).

The stipulation does not alter either party's claims to the subject matter in dispute. In other words, apart from its invalidity as shown in Point II, the stipulation is merely an agreement between counsel for the parties, not binding on Morton, as to how they will proceed during the course of the litigation. Obviously, this agreement could be rescinded at any time by mutual consent, and the fact that it is in writing rather than verbal does not add dignity to it.

Since the parties' claims remain the same, a brief review of them as set forth in the complaint and answer is appropriate:

Complaint — III	Answer — III
". . . the State of Utah . . . is the owner of the absolute right to the bed of the Great Salt Lake as delineated and determined by the official surveyed meander line of the Great Salt Lake, which meander line represents the mean high water mark of said lake as it existed at date of survey and as it existed at the date of statehood."	Denied to the extent it is an allegation of fact.
• • •	
"The State of Utah further owns all of the minerals contained within the waters of the Great Salt Lake and within the lands constituting the bed of the Great Salt Lake as herein defined."	Denied to the extent it is an allegation of fact.

Complaint — IV	Answer — IV
"The State of Utah believes that the United States of America now claims to own approximately 436,000 acres of the bed of the Great Salt Lake."	Admitted
• • •	

"In fact, the United States of America has no right, title, or interest in or to any of the lands illustrated in Exhibit A [of the complaint] or to any other part of the bed of the Great Salt Lake as located below and within the surveyed meander line."	Denied

Complaint — V	Answer — V
"The State of Utah owns the minerals and brines included within the waters of the Great Salt Lake."	Denied to the extent it is an allegation of fact.

The respective prayers for relief in the complaint and answer make it clear that each party is seeking an adjudication quieting title in it to the lands, brines and minerals described in Section 2 of the Great Salt Lake Lands Act.[1] The fact remains that the United States and Utah each claim lands, brines and minerals which are also claimed by Morton, and in order to determine the right, title and interest of the United States in the lands conveyed pursuant to the Act, the Court will have to determine whether Morton or the United States owns the lands, brines and minerals in dispute between them. Only after this is accomplished will the Secretary of the Interior be able to comply with Section 5(b) of the Act to determine the fair market value of the lands and minerals conveyed.

1. Referring again to the pleadings, the United States has denied Utah's allegation in paragraph III of the complaint that the Great Salt Lake is a navigable body of water. The United States' allegation of lack of knowledge or information sufficient to form a belief as to the truth of

---

(1) Act of June 3, 1966, 80 Stat. 192, as amended by Act of August 23, 1966, 80 Stat. 349.

the allegation of navigability constitutes a denial.[2] Thus, the ownership of the brines and minerals in solution in the Lake is an issue in this litigation, and it is plain, as set forth in paragraph 2 of the stipulation, that the United States is asserting ownership of "*all* the brines and minerals in solution" in the Lake and of "*all* of the presently submerged lands underlying the Lake." (Emphasis added)

The United States' claim of ownership of all the brines and minerals and all the submerged lands obviously encompasses the brines, minerals and submerged lands claimed by Morton. This claim of ownership can be predicated on either or both the following theories:

> (a) The Basart lands extend to the thread of the non-navigable Lake.
>
> (b) The lack of intent on the part of the United States to convey the bed of the non-navigable Lake in the patents granting title to the uplands. See *Brewer-Elliott Oil & Gas Co.* v. *United States*, 260 U.S. 77 (1922); *Oklahoma* v. *Texas*, 258 U.S. 574 (1922).

Accordingly, the disclaimer in paragraph 6 of the stipulation as to the effect of a judgment on the title of third parties claiming lands, brines or minerals is meaningless. A decision that either the United States or Utah owns *all* the submerged lands, brines and minerals in the Lake in effect will adjudicate the title of Morton and will necessarily adversely affect its interests.

We are aware of no case in which title to all the brines or minerals in solution in a non-navigable body of water has been allocated among the riparian owners and this complex problem is one which the Court may well have to resolve. It is clear, however, that a person claiming title to a body of water is an indispensable party to a suit over ownership

---

(2) Federal Rules of Civil Procedure, Rule 8(b).

of that water. *California* v. *United States,* 180 F.2d 596 (9th Cir. 1950), involved an action by the United States to quiet title to waters wholly within California against a licensee of the State of California which was diverting a portion of the water for irrigation purposes. The State of California moved to intervene as owner of the water, the denial of which motion was reversed by the court of appeals stating (180 F.2d at 602):

> "The State is asserting an interest in the subject matter as the absolute owner of the water, and as *parens patriae* on behalf of all of its citizens. That is a sufficient interest in the subject matter to entitle it to be heard just as much as if the State were joined by the United States originally as a defendant."

Despite Utah's theory of navigability set forth in the complaint, it is apparent, as is recognized in Utah's motion to file the complaint, that there are various other theories upon which Utah depends to support its claim to all or part of the property in dispute. Therefore, this litigation will not necessarily result in an all-or-nothing decision predicated on navigability or non-navigability. For example:

> (a) the Lake could be held to be navigable and the "mean high water line" fixed substantially below the meander line resulting in a division of the relicted lands between Utah and the upland owners, or
>
> (b) the Lake could be held to be navigable and only relictions existing before statehood be held to be the property of the upland owners, or
>
> (c) the Lake could be held to be navigable with all relicted lands held to be owned by the upland owners to the water's edge wherever it may be from time to time.

There could be other variations, of course, predicated on Utah's theory of man-made diversions, etc., as mentioned in its motion, but the foregoing are sufficient to illustrate

that the stipulation reflects only a superficial consideration of the substantive issues involved.

2. But even assuming that the stipulation could effectively remove from litigation the lands claimed by private parties, Morton's property rights would still be adversely affected by a decision in this suit. Pursuant to Section 6 of the Great Salt Lake Lands Act, Utah is authorized "to issue permits, licenses, and leases covering such of these lands as the State deems necessary or appropriate to further the development of the water and mineral resources of the Great Salt Lake or for other purposes." Since part of the lands and minerals claimed by the United States are claimed by Morton, the Act authorizes Utah to lease property which the United States may not own. Furthermore, Section 6 provides that all proceeds derived by Utah from the leases and licenses shall be paid to the United States as part of the compensation for the lands conveyed. Section 6 further provides:

> "If the question of the title to the United States is litigated as authorized in section 5(b) of this Act, and it is determined that the United States has no right, title and interest in lands from which revenues have been derived and paid to the United States pursuant to this section, the revenues paid to the United States shall be returned to the State of Utah without interest."

Obviously, however, if Morton owns part of the lands leased, the proceeds therefrom are Morton's property, the disposition of which will depend on the Court's decision. Neither the United States nor Utah has the right to take possession of another person's property and deprive him of the profits therefrom. Unless Morton is permitted to intervene to protect its right to these proceeds as well as to the lands and minerals in dispute, it will, in effect, be rendered remediless.

It is no answer to say that Morton can sue either the United States or Utah for the wrong done to it in depriving it of this money, since neither sovereign can be sued without its consent. Although Utah and the United States recognize in paragraph 8 of the stipulation that these payments may constitute a private person's property and that there would be liability therefor, the doctrine of sovereign immunity is ignored as is the fact that a decree will affect the disposition of this property.

The last word of the Court on the doctrine of indispensability is *Provident Trademens Bank & Trust Co.* v. *Patterson,* ..... U.S. ....., 88 S. Ct. 733 (1968), decided January 29, 1968, in which the Court, while reversing the court of appeals for not pragmatically analyzing the facts, clearly adheres to the criteria established in previous decisions. The pragmatic approach to be used in determining whether an absent person must be joined as a party is clearly not intended by the Court to mean mere expediency in resolving a difficult problem. This stipulation is an excellent example of an expedient approach on the part of the United States and Utah, which completely ignores the practical effect of the non-joinder of Morton. The Court in discussing the interest of the outsider expressly adopts the criteria of Rule 19(a) (88 S. Ct. at 738):

> "[T]he Court must consider the extent to which the judgment may 'as a practical matter impair or impede his ability to protect' his interest in the subject matter."

Applying this criterion to Dutcher, the outsider, the Court stated (88 S. Ct. at 737):

> "We may assume, at the outset, that Dutcher falls within the category or [sic] persons who, under §(a), should be 'joined if feasible.' The action was for an adjudication of the validity of certain claims against a

> fund. Dutcher, faced with the possibility of judgments against him, had an interest in having the fund preserved to cover that potential liability. Hence there existed, when this case went to trial, at least the possibility that a judgment might impede Dutcher's ability to protect his interest, or lead to later relitigation by him."

Dutcher had not sought to intervene prior to trial and it was not until the matter had gone to judgment and appeal, after years of litigation, that the court of appeals dismissed for lack of an indispensable party. In this case, which is in its initial stages, it is apparent that property, whether land, brine, minerals or money, claimed by Morton will be disposed of as a result of the Court's decree, regardless of whether or not the stipulation can be carried out. Pursuant to Section 3 of the Great Salt Lake Lands Act, the United States has expressly reserved all mineral rights, except as to brines and minerals in solution, in the lands conveyed to Utah under Section 2 and this includes the Basart lands. In any suit brought by Morton against Utah, assuming consent on the part of Utah, to test the title to the Basart lands, the United States, due to this reservation, would clearly be an indispensable party and it cannot be joined without its consent. Obviously, a disposition by reason of this litigation would "as a practical matter impair or impede" Morton's ability to protect its interest.

Since Morton's joinder will not deprive the Court of jurisdiction of the subject matter of the action—the position that the Solicitor General previously argued and to which he still adheres (see Supplemental Memorandum, p. 3—its joinder is required under Rule 19(a). Whether the Court will lose jurisdiction if other persons are joined, or whether the case should be dismissed pursuant to Rule 19(b) if they cannot be joined, has no bearing on Morton's motion.

The fourth criterion set forth by the Court in the *Provident* case is also clearly applicable to this situation, i.e., (88 S. Ct. at 739):

> "Fourth, there remains the interest of the courts and the public in complete, consistent, and efficient settlement of controversies. We read the Rule's third criterion, whether the judgment issued in the absence of the non-joined person will be 'adequate,' to refer to this public stake in settling disputes by wholes, whenever possible, for clearly the plaintiff, who himself chose both the forum and the parties defendant, will not be heard to complain about the sufficiency of the relief obtainable against them. After trial, considerations of efficiency of course include the fact that the time and expense of a trial have already been spent."

The piecemeal judgment suggested by the stipulation before the Court would not be "adequate" from the point of view of the public's interest "in complete, consistent, and efficient settlement" of the dispute with respect to the lands lying below the meander line.

II. THE STIPULATION IS AN ACTION NOT AUTHORIZED BY CONGRESS AND IS THEREFORE INVALID

A. The Stipulation Is Contrary To The Provisions Of The Great Sale Lake Lands Act

By this stipulation, the Solicitor General and the Attorney General of Utah are attempting, for the sake of convenience, to amend the plain language and intent of the Great Salt Lake Lands Act. The requirements of Section 5(b) of the Act are that Utah "may maintain an action in the Supreme Court of the United States to secure a judicial determination of the right, title and interest of the United States in the lands conveyed to the State of Utah pursuant to section 2 of this Act . . ." and that "Within two years from the completion of the action, the Secretary of the Interior shall determine the fair market value,

as of the date of the decision of the court, of such lands (including minerals) conveyed to the State pursuant to section 2 of this Act as may be found by the court to have been the property of the United States prior to the conveyance." Despite this unequivocal language that the United States' title is the subject of adjudication, paragraph 1 of the stipulation states:

> "Notwithstanding anything to the contrary in the Complaint filed herein by the State of Utah or the Answer filed by the United States, the *only objective* of the present suit is to determine whether, as against the United States, *the State* held title to the lands, brines and minerals below the meander line of the Great Salt Lake which the United States claims to have owned and conveyed to the State on June 15, 1967, with a view to later determining the compensation, if any, due by the State to the United States on account of that conveyance under Public Law 89-441." (Emphasis added)

On the basis of this stipulation, the Solicitor General, in his supplemental memorandum, arrives at the remarkable conclusion that there need be no adjudication of the United States' title in the lands.

An excellent refutation of the approach represented by this stipulation was made by the Solicitor General during the hearings before the Special Master on February 9, 1968 as follows (Transcript, pp. 27-32):

> "[Mr. Griswold] Now, the situation is different with respect to Morton International. Morton is making a claim to land adverse to the State of Utah and adverse to the United States.
>
> "With respect to the lands which come within the Basart Doctrine, the United States claims those lands and Morton International claims those lands. And I find no escape in my own mind from the conclusion that

Morton International is an indispensable party, because under the Statute and under the pleadings of the State of Utah, Utah is claiming title to these lands.

"The Secretary of the Interior is directed to convey all of the lands to which the United States may have title, and he is then directed to determine the fair market value of such lands, and that is the lands which are to be conveyed, and it is that amount which the State of Utah is under obligation to make payment, if it accepts the amount. And I do not see how this Court can render the judgment, *which is required by the Statute*, and which is sought by Utah's pleadings, without determining whether these various tracts of land are indeed owned by the United States or are owned by Morton International.

"JUDGE GANEY: Isn't Utah the only one that has any concern about that? It is only the lands that they may have title to? Morton hasn't any concern about whether Utah gets all this land, have they?

"MR. GRISWOLD: As I see it, that is not the way the Statute is written, *and I assume that the way the Statute is written defines the consent of the United States to this suit.*

"The way the Statute is written is that all lands owned by the United States shall be conveyed to the State of Utah.

"JUDGE GANEY: Except valid claims.

"MR. GRISWOLD: And we have no way of determining whether these claims are valid or not except by having them litigated before this Court.

"The United States claims these Basart lands, Morton International claims these Basart lands. If the United States' claim that it owns the land is sound, then it is entitled to have those lands included in the lands that are valued by the Secretary of the Interior and are paid for by the State of Utah.

"If the claim of the United States is not sound, then these lands are excluded from the conveyance to Utah and from the payment of the right of Morton remains inviolate, but that question cannot be determined until it is litigated. And I find no escape from the conclusion that Morton and others similarly situated are indispensable parties to this case because the question of their title or not is absolutely essential to the determination of what lands are conveyed to Utah; and on that basis what lands Utah is obligated to pay for.

"JUDGE GANEY: What is your suggestion, assuming, without deciding, that they are not indispensable and the Court could prepare a decree, as I have indicated, and convey to Utah all those lands which are uncontested, and that would leave Morton, as I said to Mr. Wollaeger, in the same position as they are today, there is no impairment under the guideline which Mr. Justice Harlan laid down, and that is the last that I know of, the last of the criteria which ought to be applied as to indispensable parties. What harm comes to Morton?

"MR. GRISWOLD: *As I have thought about this problem over the last two weeks, there have been times when it seems to me that a solution might be if Utah would be willing to amend its bill so as to make it applicable only as to such areas of land, and it might have to specify them by metes and bounds, which might be an enormous task, only as to such land as to which there was no other claim, thus narrowing the case to the areas which are vast, where the sole issue is between the United States and the State of Utah. And that would eliminate all questions of other, or indispensable, parties.*

"*But I am afraid that that just wouldn't comply with the Statute as Congress has enacted it.* Maybe we could get the Statute amended to make it applicable only to lands as to which there is no other claimant, but the Statute provides that the Secretary of Interior shall by quit-claim deed convey to the State of Utah

all right, title and interest of the United States in lands including brines and minerals in solution in the brines or precipitated or extracted therefrom, lying below the meander line of the Great Salt Lake, and these Basart lands are lands, which lie below the meander line of the Great Salt Lake.

"Title to them is claimed by the United States and, indeed, it is not limited to Basart lands. As I understand it, there are some other lands where title is owned by the United States, and unless the United States conveys all its lands, it does not comply with the Statute.

"The provision of the Statute with respect to Utah 'may maintain an action in the Supreme Court of the United States to secure a judicial determination of the right, title and interest of the United States in the lands conveyed to the State of Utah pursuant to Section 2 of this Act.' And the lands conveyed to Utah under Section 2 of the Act are all right, title and interest in lands below the meander line, and they include the Basart and the other lands, and I don't see how you can determine what lands are to be conveyed, what lands are to be adjudicated, and what lands are to be paid for, unless you determine the claims of Morton International and, as far as I can see, of any other claimant to these lands other than the United States.

"On that basis, it seems to me that parties who claim adverse to the United States are indispensable parties.

"JUDGE GANEY: What is your thought back to the exception of valid claims in the Statute?

"MR. GRISWOLD: If this Court adjudicates that Mortor [sic] has a valid claim, then this consequence is that the conveyance made by the Secretary of the Interior does not include that land.

"JUDGE GANEY: You think it must be determined first, not on mere allegation, but there must be a determination of title?

"MR. GRISWOLD: I don't see how that can be avoided, because if this Court determines that the title is in the United States, then it is covered by the conveyance and is to be valued and paid for by the State of Utah. *I don't see how you can duck that, or dodge it, or escape it.*

"I repeat, a possible solution would be to see some kind of amendment of the Statute which would narrow the conveyance to what might be called the in-dispute lands, meaning by that, only the dispute between Utah and the United States remaining. Whether that would be acceptable to Utah or not, I don't know. If the Statute were so amended and Utah then amended its bill under the Statute, it would be conceivable that this case in this Court could be confined to the distpute [sic] between the United States and Utah. That would, of course, leave a large amount of loose ends out there, from which there is no easy way to see how they could be resolved."

(Emphasis added)

And, again, quoting the Solicitor General (Transcript, pp. 77-81):

"MR. GRISWOLD: I share to some extent the wish or hope of the State of Utah that this could be kept a nice, simple case with two parties, because it obviously presents problems, both practical and legal, if it can't.

"But with respect to the suggestion that since a quitclaim deed has already been given, there is no legal problem, I find myself getting back to the Statute which underlies this whole proceeding.

"You will recall that the State of Utah had an option to either proceed without a Court decision or to start an original action in the Supreme Court of the United States, and the language of the Statute with respect to the second option, which is the one which has been followed, the State may maintain an action in the Supreme Court of the United States to secure a judi-

cial determination of the right, title and interest of the United States in the lands conveyed to the State of Utah, pursuant to Section 2 of this Act.

"So that the proceeding is to determine, is to obtain a judicial determination of the right, title and interest. It isn't enough to say the United States, or whatever it is, quit-claims it. There must be a determination of what is the right, title and/or interest of the United States, and specifically as between the United States and Morton Salt, that becomes an issue because if the land belongs to Morton Salt, then the United States has no right, title or interest and the quit-claim deed conveyed no interest.

"*Then the Statute goes on, consent to join the United States as a defendant to such an action is hereby given. That is an action to determine the right, title and interest of the United States.* Then the Statute goes on, within two years from the completion of the action, the Secretary of the Interior shall determine the fair market value as of the date of the decision of the Court, of such lands conveyed to the State, and not until you determine what lands were in fact conveyed to the State by the quit-claim deed, and that involves the resolution of the issue between the United States and Morton Salt, to use it as an example, but all the other possible claimants, too, and not until that question has been determined is the objective of the suit carried out.

"So I find, simply, no escape, much as I would like to do it otherwise, from the proposition that persons who claim adversely to the United States are indispensable parties without whose presence this action, *as contemplated by the Statute and to which Congress has given its consent*, simply cannot be carried out.

"JUDGE GANEY: In summary, you say that the Statute, the basic right here, gives the United States the right to have determined the validity of its lands there?

"MR. GRISWOLD: Yes, sir, Your Honor.

"JUDGE GANEY: You think that is the contemplation and Congressional intent in the passage of this Act giving permission, basically, to the United States?

"MR. GRISWOLD: Because it is only such lands which the United States owns which are conveyed to Utah, and for which Utah must make payment, and which is the object of this decision.

"JUDGE GANEY: But Utah doesn't want lands that are not, that are in dispute. Why must there be a decision to the validity of Morton Salt and 100 other claimants here in this action before the United States could convey to Utah?

"MR. GRISWOLD: I quite agree, Your Honor, the Statute could have been drafted differently. It could have been drafted to provide for a conveyance to the State of Utah of all lands not owned by any other party and not disputed as to title, between the United States and any other party, *but the Statute is perfectly plainly worded.*

"JUDGE GANEY: Yes, I have read its many words.

"MR. GRISWOLD: For a judicial determination of the right, title and interest of the United States, and with respect to the lands that Morton Salt claims and the United States claims, *you cannot comply with the terms of the Statute without determining whether the United States is wrong or Morton Salt is right.*

"JUDGE GANEY: Well, you read that in. Maybe that is correct. The validity of all of the lands there must be conveyed to Utah. They must be conveyed. Otherwise, the Statute is of no effect.

"MR. GRISWOLD: If the lands Morton Salt claims does not, in fact, belong to Morton Salt, then it is covered by this conveyance which the United States has already given and must be paid for by the State of Utah.

"JUDGE GANEY: Yes, but Utah isn't concerned with that. They are the persons bringing this suit. Why should the United States be concerned with what lands Utah demands?

"MR. GRISWOLD: Because the United States will get payment for it and Utah must make payment.

"JUDGE GANEY: For only the lands that Utah wants.

"MR. GRISWOLD: No, for all of the lands in which the United States has title. Not just the land that Utah wants.

"JUDGE GANEY: But they aren't suing for all the lands. They are suing, it seems to me, for all the lands of the United States, except those that are in dispute.

"MR. GRISWOLD: No, I am sorry. It might well have been that. That might have been in retrospect a convenient way to have drafted the Statute. But the Statute provides for a judicial determination of the right, title and interest of the United States in the lands conveyed to the State of Utah, and the lands conveyed to the State of Utah are all the right, title and interest of the United States in lands lying below the meander line of the Great Salt Lake. And if the United States, in fact, owns these lands that Morton Salt claims, and other claimants claim, that land is conveyed to the State of Utah and the State of Utah is obligated to pay for it."

(Emphasis added)

The temptation to try the stipulation device to keep this "a nice simple case with two parties" has evidently overpowered reason. The Solicitor General was right the first time.

B. The Agreements To Convey And The Conveyances Provided For By This Stipulation Are Beyond The Power Of The Solicitor General; Moreover, The Agreement Of The Attorney General Of Utah Is Not Binding On The State

1. Despite the requirements of the Act that Utah shall pay the fair market value, as determined by the Secretary,

"of such lands (including minerals)" conveyed to Utah "as may be found by the Court to have been the property of the United States prior to the conveyance," the Solicitor General pursuant to this stipulation has agreed:

> "Should the State establish its own superior title as against the United States to the uncovered lands indicated on the attached map as 'public domain reliction lands,' the United States, without further contest in this or any other proceeding, shall abandon any claim as against the State to ownership prior to June 15, 1967, of the uncovered lands indicated on the attached map as 'public land reliction under *Basart*,' and shall acknowledge that the State owes nothing to the United States on account of the conveyance of such lands under Public Law 89-441."

In other words, the Solicitor General is agreeing, purportedly on behalf of the United States, that the United States will convey the Basart lands to Utah without compensation if Utah should successfully show that it has title to "public domain reliction lands." There is nothing in the Act, however, which can possibly be construed to delegate to the Solicitor General (or to anyone else in the Executive Branch of the Government) the authority to make such an agreement, nor to relinquish Federal rights in lands without compensation unless and until such lands have been determined by the Court, pursuant to the Act, not to have been owned by the United States.

Accordingly, the agreement to relinquish Federal rights is invalid and the conveyance of such lands would be void. As stated by this Court in *Sioux Tribe of Indians* v. *United States*, 316 U.S. 317, 326 (1942):

> "Since the Constitution places the authority to dispose of public lands exclusively in Congress, the executive's power to convey any interest in these lands must be traced to Congressional delegation of its authority."

See also *Alabama* v. *Texas*, 347 U.S. 272 (1954).

2. With respect to the Attorney General of Utah's power to bind the State to pay for the Basart lands without adjudication of title thereto as provided in paragraphs 3 and 4 of the stipulation or to indemnify the United States as provided in paragraph 8 of the stipulation, Section 4(5) of the Utah legislation authorizing the State to initiate this action[3] provides:

> "No money payments to the United States other than proceeds paid to the United States from permits, licenses, and leases issued by the State on lands below the meander line as provided in S-265 shall be made without specific appropriation by the State Legislature."

It seems clear that the Attorney General's undertakings are also beyond his power and not binding on the State, at least with respect to this specific piece of litigation.

III. TO PRESERVE ITS CONSTITUTIONALITY THE ACT SHOULD BE CONSTRUED TO REQUIRE MORTON'S INTERVENTION

If the Great Salt Lake Lands Act could be construed to prevent a private party such as Morton from intervening to protect the validity of its title or its property interest, the Act would be unconstitutional as a deprivation of property without due process of law prohibited by the Fifth Amendment. A person's property rights are not subject to impairment by legislative action. *Choate* v. *Trapp*, 224 U.S. 665 (1911); *Union Pacific Railroad Co.* v. *United States*, 99 U.S. 700 (1879). Such a construction is to be avoided. In the interpretation of a Federal statute it is a cardinal principle of the Court to reach a conclusion which will avoid serious doubt as to the statute's constitutionality. *United States* v. *Rumely*, 345 U.S. 41 (1953). Nor will the Court lightly impute to Congress an intent to invade the

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[3] Laws of Utah, 1966, 2d Spec. Sess. ch. 11.

rights protected by the Bill of Rights. *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1960).

We would hope that the issue of the constitutionality of the Act can be avoided in the interest of obtaining a judicial resolution of the important substantive questions involved in this case.

CONCLUSION

For the reasons set forth in this brief Morton's motion to intervene should be granted.

Respectfully submitted,

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April, 1968

CERTIFICATE OF SERVICE

I, Frank A. Wollaeger, one of the attorneys for Morton International, Inc. and a member of the Bar of this Court, do hereby certify that copies of the foregoing Brief were served upon the Solicitor General of the United States of America, Department of Justice, Washington, D. C. 20530; the Attorney General of Utah, 236 State Capitol Building, Salt Lake City, Utah 84114; and George E. Boss, Senior & Senior, 10 Exchange Place, Salt Lake City, Utah 84111, counsel for Great Salt Lake Minerals & Chemicals Corporation, by having the same delivered to their respective offices, in accordance with Rule 33 of the Rules of this Court.

FRANK A. WOLLAEGER
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